EDITOR'S NOTE

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No. 84-1160-CFX
Status: GRANTED

Title: Bertolc J. Pembaur, Petitioner
v.
City of Cincinnati, et al.

Docketed:
January 15, 1985

Court: United States Court of Appeals
for the Sixth Circuit

Counsel for petitioner: Marley, Robert E.

Counsel for respondent: Luttenegger, Jerry F., Ney Jr., Arthur M., Friedman, Roger E.

Entry	Date	Note	Proceedings and Orders
1	Jan 15 1985	G	Petition for writ of certiorari filed.
2	Feb 27 1985		DISTRIBUTED. March 15, 1985
4	Mar 11 1985		Order extending time to file response to petition until March 22, 1985.
5	Mar 22 1985		Brief of respondent Cincinnati, et al. in opposition filed.
6	Mar 27 1985		REDISTRIBUTED. April 12, 1985
7	Jun 7 1985		REDISTRIBUTED. June 13, 1985
8	Jun 17 1985		Petition GRANTED.
			**********
9	Jul 31 1985		Brief of petitioner Bertolc J. Pembaur filed.
11	Aug 1 1985	G	Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae filed.
12	Aug 31 1985		Brief of respondents Hamilton County, et al. filed.
13	Sep 3 1985		Record filed.
14	Sep 18 1985		Motion of American Civil Liberties Union, et al. for leave to file a brief as amici curiae GRANTED.
15	Oct 17 1985		CIRCULATED.
16	Oct 22 1985		SET FOR ARGUMENT, Monday, December 2, 1985. (2rd case).
17	Nov 16 1985	X	Reply brief of petitioner Bertolc J. Pembaur filed.
18	Dec 2 1985		ARGUED.

No. 84-1160

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BERTOLD J. PEMBAUR, M.D.,

Petitioner,

vs.

CITY OF CINCINNATI, OHIO, HAMILTON COUNTY, OHIO, HON. NORMAN A. MURDOCK, HON. JOSEPH M. DeCOURCY, JR., AND HON. ROBERT A. TAFT, II

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Can a single, discrete decision of an elected county prosecutor which directly causes an unconstitutional search of a private medical office fairly be said to represent official policy so as to render a county liable under 42 U.S.C. § 1983?

STATEMENT OF INTERESTED PARTIES

Certain defendants originally named in the Complaint have not been listed as parties because petitioners believe that they are not interested in the outcome of this petition. Pursuant to that belief, there are no interested parties who have not been identified in the caption. Respondents Norman A. Murdock, Joseph M. DeCourcy, Jr., and Robert A. Taft, II are the commissioners of Hamilton County, Ohio and are named only in their official capacities as the county itself. *State ex rel. Commissioners* v. *Allen,* 86 Ohio St. 244 (1912); Findings of Fact, Opinion and Conclusions of Law (Appendix B at 14a).

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Bertold J. Pembaur, M.D., plaintiff in the action below, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Sixth Circuit filed on the 18th day of October, 1984.

OPINIONS BELOW

The opinion of the Court of Appeals, filed on October 18, 1984, is reproduced in Appendix A. The Findings

of Fact, Opinion And Conclusions of Law of the United States District Court, filed on April 5, 1983, is reproduced in Appendix B.

JURISDICTION

The judgment of the Court of Appeals was filed on October 18, 1984. This petition was filed within 90 days of October 18, 1984. The jurisdiction of this Court is founded upon 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES:

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (As amended December 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284.)

STATEMENT OF THE CASE

Petitioner, Bertold J. Pembaur, M.D., is the sole proprietor of a medical clinic known as the Rockdale Medical Center, located in the City of Cincinnati, Hamilton County, Ohio.

On May 19, 1977, two unidentified persons dressed in plain clothes arrived in the reception area of the clinic and sought to enter the inner offices of the clinic. Learning of this, plaintiff barred shut the door between the public reception area and the private working areas of the clinic. (Tr. pp. 51, 69-70) Dr. Pembaur was then told that the two individuals were deputy sheriffs armed with capiases[1] to bring two of plaintiff's employees be-

[1] A capias is a writ of attachment issued pursuant to Ohio Revised Code Section 2317.21 to have a sheriff bring a person before the court or notary before whom a subpoenaed witness has failed to appear to answer for civil contempt.

fore the grand jury. (Joint Exhibit II and III, Tr. p. 134) The deputies asked the doctor to let them into the inner areas of the medical clinic to search for the named employees. Learning that the deputies had no search warrants (Tr. pp. 48-49), Dr. Pembaur refused entry. (Tr. 52)

Shortly thereafter, Cincinnati police officers arrived and also told plaintiff to permit them to enter to search for the persons named in the capiases. Dr. Pembaur again refused entry. (Tr. p. 52) The police officers called for a supervisor and a sergeant arrived, repeating the request to permit entry. (Tr. p. 53) Plaintiff continued to refuse to open his door absent a search warrant directed to him. (Tr. pp. 53, 135)

The deputies then, pursuant to department policy, called the sheriff's execution officer and were advised to call an assistant county prosecutor, defendant William Whalen. They called Whalen and advised him of the situation. Whalen spoke with Simon Leis, the Hamilton County Prosecutor, and told him that petitioner would not permit entry; Leis told Whalen to tell the deputies to "go in and get them." (Tr. pp. 53-54, 366)

Finally, more than two hours after their arrival (Tr. p. 56), the deputies, still without a warrant and after again being refused entry, sought to batter against the door to break it down. This failing, a Cincinnati police officer took a fire axe and chopped the door down. (Tr. p. 54) The deputies and police officers entered the private inner areas of the medical center and searched for the persons named in the capiases. (Tr. pp. 55, 71) The persons sought were not found. (Tr. p. 55)

Petitioner commenced this Civil Rights Action pursuant to 42 U.S.C. § 1983 in the Southern District of

Ohio, Western Division, against Hamilton County, Ohio, the City of Cincinnati, Ohio, and against certain individuals alleged to have violated the doctor's constitutional rights. Jurisdiction was based on 28 U.S.C. §§ 1331 and 1343(3). After a trial to the court, Findings of Fact, Opinion and Conclusions of Law were issued on April 5, 1983. The court ruled in favor of all the defendants, finding that the individual defendants were entitled to immunity and that the County and City were not liable because plaintiff had not suffered a constitutional deprivation committed pursuant to some official policy.

Upon appeal to the Sixth Circuit Court of Appeals, the court affirmed the trial court's holding as to Hamilton County, but reversed as to the City of Cincinnati, Ohio. The Court recognized that while the instructions to the deputy sheriffs "accorded with the law as it stood in 1977" based upon *Steagald* v. *United States*, 451 U.S. 204 (1981), plaintiff had suffered an "obvious constitutional violation." (Appendix A at 5a-6a)

The Appellate Court also ruled that both the county prosecutor and the county sheriff are elected officials who can establish official county policy to form the basis for the imposition of § 1983 liability. (Appendix A at 7a) The court upheld the lower court's ruling in favor of the county, however, on the ground that a "single, discrete decision is insufficient, by itself, to establish that the Prosecutor, the Sheriff, or both were implementing a governmental policy." (Appendix A at 8a) The court also held that the Sheriff could not have ratified his deputies' conduct absent evidence of "acquiescing in a prior pattern of conduct." (Appendix A at 8a)[2]

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[2] One of the deputies testified, however, that on prior occasions they had served capiases on the property of persons other than the

REASONS FOR GRANTING THE WRIT

The basic issue in this petition is whether a unit of local government should be held liable for a single, discrete decision, made by an elected official whose acts are found to represent official policy, which proximately causes a person to be deprived of his constitutional rights. Petitioner believes that liability should attach in such a situation and that the decision of the courts below must be reversed.

The Court of Appeals found that Hamilton County, Ohio was not liable to plaintiff for the "obvious constitutional violation" he suffered, a patently illegal search of private medical offices, for the sole reason that the doctor "failed to establish . . . anything more than that on this *one occasion*, the Prosecutor and Sheriff decided to force entry into his office." (Appendix A at 8a) Thus, while the Court recognized that the prosecutor and sheriff are officials whose "acts represent the official policy of Hamilton County," the Sixth Circuit has adopted a rule that

> "[a] single, discrete decision is insufficient, by itself, to establish that the Prosecutor, the Sheriff, or both were implementing governmental policy." (Appendix A at 8a)

This holding is both an erroneous interpretation of the official policy requirement under § 1983 as defined

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subject of the capias. (Tr. pp. 56-57) The Hamilton County Sheriff also testified that although he could not cite a specific example, he assumed forcible entries had been made to serve a capias on the property of a person sought to be apprehended. (Tr. pp. 222-223) He testified that after reviewing the situation it was his opinion that his deputies "acted fully and competently within their authority." (Tr. pp. 214-215)

by this Court and in conflict with decisions rendered by other circuit courts of appeals.

In *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978), this Court held that municipalities and other units of local government not entitled to Eleventh Amendment immunity are "persons" who may be liable under § 1983 for an unconstitutional action that "implements or executes a policy statement, ordinance, regulation *or decision* officially adopted and promulgated by that body's officers." 436 U.S. at 690 (emphasis supplied) The decision in *Monell* concluded that a governmental entity is liable under § 1983 where an injury is inflicted by the execution of a policy or custom "whether made by its lawmakers *or by those whose edicts or acts may fairly be said to represent official policy.*" 436 U.S. at 694 (emphasis supplied).

Monell, however, merely drew the outline for local government liability under § 1983; this Court specifically stated that it was not addressing the "full contours" of municipal liability under § 1983 and would "expressly leave further development of this action to another day." 436 U.S. at 695.

Owen v. *City of Independence*, 445 U.S. 622 (1980), raised the question of municipal immunity against the background of a single incident of alleged unconstitutional conduct based upon the interactive behavior of various city officials. In reaching the conclusion that local government entities are not entitled to immunity from liability for damages resulting from their unconstitutional acts, 445 U.S. at 657, this Court examined and relied upon historical situations where liability was imposed. Thus, while not discussing the official policy question directly, it was recognized that:

> "A municipal corporation is liable to the same extent as an individual for any act done by the express authority of the corporation, or of a branch of its government, empowered to act for it upon the subject to which the particular act relates, and for any act which, after it has been done, has been lawfully ratified by the corporation. T. Sherman & A. Redfield, A Treatise on the Law of Negligence § 120, p. 139 (1869)." 445 U.S. at 640.

Quoting Chief Justice Shaw's decision in *Thayer* v. *Boston,* 36 Mass. 511, 515-516 (1837), this Court noted that:

> "if it was not known and understood to be unlawful at the time, if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual, in consequence of the acts thus done." 445 U.S. at 641.

It can therefore be concluded that since the Civil Rights Act was adopted to afford relief for constitutional deprivations caused by the "misuse of power, possessed by virtue of state law," *Monroe* v. *Pape,* 365 U.S. 167, 184 (1968); *Owens* v. *City of Independence,* supra, 445 U.S. at 650, a rule such as that adopted by the Sixth Circuit, effectively exempting a local governmental entity from liability for the first unconstitutional act directed by a policy-making official, defeats the very purpose of § 1983. Particularly where, as here, the govern-

ment officials are found to enjoy immunity, the Sixth Circuit holding leaves the injured person without remedy or relief.

This is not a case where the plaintiff seeks to find official policy in some custom, practice or inaction. See, e.g. *Gilmere* v. *City of Atlanta,* 737 F.2d 894 (11th Cir. 1984); *Turpin* v. *Mailet,* 579 F.2d 152 (2d Cir. 1978), vacated *sub. nom. City of West Haven* v. *Turpin,* 439 U.S. 974 (1978), *cert. denied,* 439 U.S. 998 (1978); *Smith* v. *Ambrogio,* 456 F.Supp. 1130 (D. Conn. 1978). Those courts apparently would recognize governmental liability for a single, discrete decision by a policy-making official. See *Gilmere* v. *City of Atlanta, supra,* 737 F.2d at 901 (implementation or execution of "policy statement, ordinance, resolution or decision" that is "the moving force of the constitutional violation" establishes governmental liability, citing *Monell, supra,* 436 U.S. at 690-691 and *Polk County* v. *Dodson,* 454 U.S. 312, 326 (1981)); *Turpin* v. *Mailet,* 619 F.2d 196, 202 n. 7 (2d Cir. 1980), *cert. denied,* 449 U.S. 1016 (1980); *Smith* v. *Ambrogio, supra,* 465 F.Supp. at 1134 n. 3. Where a plaintiff seeks to find official policy in custom, practice, or inaction, a single discrete act by a deputy sheriff, rather than by an elected policy-making official, would not, and should not, form the basis for governmental liability.

On the other hand, we have here a specific decision and direct order by a county official who has policy-making authority to "go in and get them." The result of this direct order to the deputy sheriffs was the deprivation of petitioner's constitutional right to be secure from unreasonable searches.

Clearly, a unit of local government should be liable for the decisions of its policy-makers, be it the first oc-

casion or an oft-repeated situation, which directly cause the deprivation of an individual's constitutional rights. An elected county prosecutor is certainly one "whose edicts or acts may fairly be said to represent official policy." *Monell, supra,* 436 U.S. at 694. There is simply no reason to grant a unit of local government immunity from liability for the first edict or act in a particular area which causes a constitutional deprivation.

Petitioner believes that this is the appropriate case in which to resolve this substantial issue of federal law. The courts below have already held that the decision of the elected county prosecutor to "go in and get them" proximately caused petitioner to suffer a constitutional deprivation under color of state law. The official policy question is thus the only issue to be resolved.

Not only have the trial and appellate court rulings here erroneously decided a federal question of substance, but the Circuit Court's decision conflicts with the holdings on this very issue by other Courts of Appeals and District Courts.

Recently, the Eighth Circuit specifically addressed the question of whether a county may be liable under § 1983 for a single decision of a county official. In *Sanders* v. *St. Louis County,* 724 F.2d 665, 668 (8th Cir. 1983), the court stated:

> "It may be that one act of a senior county official is enough to establish the liability of the county, if that official was in a position to establish policy and if that official himself directly violated another's constitutional rights. See *Monell,* 436 U.S. at 694, 98 S.Ct. at 2037; *Quinn* v. *Syracuse Model Neighborhood Corp.,* 613 F.2d 438, 448 (2d Cir. 1980); *Bowen* v. *Watkins,* 669 F.2d 979, 989-90 (5th Cir. 1982)."

The Fifth Circuit, in several cases, has held that a local government may be liable where its official policy-makers "by direct orders" set a course of action which results in the deprivation of a constitutional right. *Bennett* v. *City of Slidell,* 728 F.2d 762, 767 (5th Cir. 1984). There, the city was found not to be liable because the government officials, a city attorney and building inspector, were held not to be among "those whose edicts or acts may fairly be said to represent official policy." 728 F.2d at 769. The court specifically recognized, however, that elected county officers derive authority to set governmental policy in certain areas from the electorate. 728 F.2d at 765-66, nn. 1 & 2.

In *Van Ooteghem* v. *Gray,* 628 F.2d 488 (5th Cir. 1980), *modified en banc,* 654 F.2d 204 (5th Cir. 1981), *cert. denied,* 455 U.S. 909 (1982), the court held that the improper discharge of an employee by an elected county official, a single, discrete decision, represented the official policy of the county. 628 F.2d at 495. Similarly, in *Familias Unidas* v. *Briscoe,* 619 F.2d 391, 404 (5th Cir. 1980), the court recognized that the official conduct and decisions of an elected county official "must necessarily be considered those of one 'whose edicts or acts may fairly be said to represent official policy' for which the county may be held responsible under section 1983."

Finally, the district court in *Himmelbrand* v. *Harrison,* 484 F.Supp. 803, 810 (W.D. Va. 1980), relying on *Monell, supra,* 436 U.S. at 694, and *Smith* v. *Ambrogio,* 456 F.Supp. 1130, 1134 n. 3 (D. Conn. 1978), stated that "discrete" acts of government officials may represent official policy even where they are directed at only a single individual, where the conduct of the government official may "fairly be said to represent official policy."

CONCLUSION

The ruling of the Circuit Court, exempting from liability the first incident of unconstitutional conduct caused by a policy-maker's decisions, effectively emasculates the Civil Rights Act as a remedy for injuries suffered by reason of the misuse of governmental power. A unit of local government should be held liable under § 1983 to the injured individual where a policy maker, be it a city council or an elected county official, makes a decision which the body or person has the authority to make, that directly sets a course of action resulting in the deprivation of a constitutional right.

For the reasons stated, a Writ of Certiorari should issue to review the judgment of the Court of Appeals in this case.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-3325

BERTOLD J. PEMBAUR, M.D.,
Plaintiff-Appellant,

v.

CITY OF CINCINNATI; HAMILTON COUNTY; HON. NORMAN MURDOCK, COUNTY COMMISSIONER; HON. ROBERT A. TAFT, II, COUNTY COMMISSIONER; WILLIAM P. WHALEN, JR.; AND RUSSELL L. JACKSON,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio

Decided and Filed October 18, 1984

Before: KENNEDY and JONES, Circuit Judges; and COHN, District Judge.*

* The Honorable Avern Cohn, United States District Court for the Eastern District of Michigan, sitting by designation.

JONES, Circuit Judge. This matter is before the Court on the appellant's appeal from the district court's order dismissing his civil rights action under 42 U.S.C. § 1983.

The appellant, Bertold J. Pembaur, a licensed doctor specializing in family medicine, maintains an office known as the Rockdale Medical Center (Center), which is located at 430 Rockdale Avenue in Cincinnati. During the spring of 1977, the Hamilton County Grand Jury indicted Pembaur in a six-count indictment. During the investigation of the charges, subpoenas were issued for the appearance of two of Pembaur's employees before the Grand Jury. These employees failed to appear at the designated time and capiases or writs of attachment were issued for their arrest.

On May 19, 1977, two deputy sheriffs from the Hamilton County Sheriff's Department appeared at the Center without a search warrant to serve the capiases which listed the employees' home addresses and not the Center's address. Upon their arrival, Pembaur refused to let them into the inner offices to search for the employees. In fact, he barricaded the door to those offices, called the press and the Cincinnati Police Department, and continued to refuse access to the inner offices.

Because of Pembaur's actions, one of the deputies called the Sheriff's office who advised him to call William P. Whalen, Jr., an assistant prosecuting attorney for Hamilton County. Simon Leis, prosecutor at the time, told Whalen to instruct the officers to serve the capiases. When the deputies were unsuccessful in their attempt to force the door, a Cincinnati police officer took an axe and chopped the door down which enabled the deputies and police officers to enter the inner offices. The employees, however, were not found.

Subsequently, Pembaur filed a civil rights action in the district court under § 1983 alleging deprivation of his Fourth and Fourteenth Amendment rights. Pembaur named the City of Cincinnati (City), Hamilton County (County), the Hamilton County Commissioners in their official capacity (Commissioners), the Chief of the Cincinnati police department, the Hamilton County Sheriff, William Whalen, six unnamed Cincinnati police officers, two unnamed deputy sheriffs, and Russell Jackson, a Secret Service officer appointed by the county prosecutor pursuant to state law as defendants. After a bench trial, the district court made certain findings of fact and conclusions of law and, as a consequence, dismissed Pembaur's action in its entirety. On appeal, Pembaur raises only the dismissal of his claims against Whalen, the County, and the City as grounds for reversal.

In a case tried to the court, the district court's findings of fact will be set aside only if they are clearly erroneous. Fed. R. Civ. P. 52 (a). A factual finding is clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Kennedy* v. *Commissioner*, 671 F.2d 167, 174 (6th Cir. 1982) (citing *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948)). Ultimate findings of fact, however, are subject to *de novo* review, as are the district court's conclusions of law, because they require the application of legal principles. *See Roth Steel Products* v. *Sharon Steel Corp.*, 705 F.2d 134, 143 & n.19 (6th Cir. 1983). We turn now to a review of the district court's factual and legal findings.

I

As to Pembaur's claim against Whalen, the district court concluded that Whalen was entitled to at least a good faith immunity for his role in the events that led to the lawsuit and that Whalen's actions had not violated any clearly established statutory and constitutional rights of Pembaur. Thus, the court held that Whalen could not be held liable for any damages.

On appeal, Pembaur concedes that Whalen was entitled to good faith immunity. He contends, however, that the district court erred in finding that Whalen's actions did not violate any clearly established constitutional right.

In *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982), the Supreme Court held "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Thus, before applying the shield of good faith immunity we must make two determinations. First, we must determine what the applicable law was at the time of the alleged violation. Second, we must determine whether that law was clearly established. *Id.*

In *United States* v. *McKinney,* 379 F.2d 259, 263 (6th Cir. 1967), we held that a search warrant is not necessary to execute an arrest warrant on the premises of a third party if the authorities have probable cause to believe that the suspect could be found on the premises. We reasoned that "even if we were to accept appellant's premise that a search warrant must be obtained in the absence of exceptional circumstances, there is good reason to hold that the issuance of an arrest warrant is itself an exceptional cir-

cumstance obviating the need for a search warrant." Id. at 263 (footnote omitted). Pembaur asserts that this rule of law was changed in 1974 by this Court's opinion in *United States* v. *Shye,* 492 F.2d 886 (6th Cir. 1974). We disagree.

In *Shye,* we followed the D.C. and Fourth Circuits by holding that a warrantless entry of a residence by authorities to effect an arrest was on the same constitutional footing as a warrantless entry to conduct a search; both are per se unreasonable absent exigent circumstances. 492 F.2d at 891, 893 (following *Dorman* v. *United States,* 435 F.2d 385 (D.C. Cir. 1970) (en banc); *Vance* v. *North Carolina,* 432 F.2d 984 (4th Cir. 1970)). We upheld the arrests in *Shye,* however, because we found that they were justified by exigent circumstances. *Id.* at 892. Pembaur's argument ignores a factual distinction between *Shye* and *McKinney;* the arrests in *Shye* were made *without* a warrant. The distinction is critical because *McKinney* indicated that the issuance of an arrest warrant itself could be "an exceptional circumstance obviating the need for a search warrant." 379 F.2d at 263. Consequently, *Shye* did not change the rule of *McKinney.* Indeed, that rule was not changed until four years *after* the actions complained of by Pembaur. *See Steagald* v. *United States,* 451 U.S. 204 (1981). Whalen's actions, therefore, did not violate any clearly established constitutional right. In fact, his instructions to the officers accorded with the law as it stood in 1977. Accordingly, he was entitled to the defense of good faith immunity and the dismissal of the damage claims against him was proper. No injunctive or declaratory relief was sought.

II

Pembaur also sought to impose liability on the County for the actions of the Sheriff and the Prosecutor. The district court, however, concluded that the County could not be held liable for the policies of the Sheriff because the Sheriff was not subject to the control of the Board of Commissioners (Board), the County's governing body. The court reasoned that the Sheriff's powers and duties were established by the state legislature, a fact which presumably rendered them state officials. Although the district court did not decide whether the County could be held liable for the policies of the Prosecutor, it did hold that Pembaur suffered no constitutional deprivation as a result of county policy or custom.[1]

In *Monell* v. *Department of Social Services,* 436 U.S. 658, 694 (1978), the Supreme Court held that a local government can be liable in a § 1983 action when its official policy or governmental custom is responsible for a deprivation of constitutional rights.[2] Apparently recognizing that a local government's "official policy" can originate from more than one source, the Court stated ". . . it is when execution of a government's policy or custom, *whether*

[1] Because it is clear that authorities may not legally search for the subject of an arrest warrant in the home or office of a third party without first obtaining a search warrant, *Steagald,* 451 U.S. 204 (1981), we must read this language as indicating that, in the district court's view, the obvious constitutional violation that occurred in this case did not result from the policy or custom of either the County or City.

[2] The Court in *Monell* specifically noted that the § 1983 liability may not be premised upon a respondeat superior theory. 436 U.S. at 691; *accord Local No. 1903 UAW* v. *Bear Archery,* 617 F.2d 157, 160 (6th Cir. 1980).

made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." *Id.* (emphasis added). *See also Owen* v. *City of Independence,* 445 U.S. 657-58 (1980). Thus, the Board's lack of control does not necessarily preclude a finding of liability on the part of the County. We must determine whether the nature and duties of the Sheriff are such that his acts may fairly be said to represent the county's official policy with respect to the specific subject matter.

Initially, we note that, the district court is incorrect to the extent that its decision implies that the Sheriff is not a County official. The Sheriff is elected by the residents of the County, OHIO REV. CODE ANN. § 311.01 (Baldwin 1982), and serves as the "chief law enforcement officer of the county." 1962 Op. Att'y Gen. No. 3109. He submits his budget requests to the Board, OHIO REV. CODE ANN. § 311.20, which in turn furnishes his office, books, furniture, and other materials. OHIO REV. CODE ANN. § 311.06. His salary and all training expenses are also paid out of the general county fund. OHIO REV. CODE ANN. §§ 325.01-06. Although none of these factors is itself determinative, we believe it is obvious that the Sheriff is a County official. Moreover, we believe that the duties of the Sheriff, as enumerated in OHIO REV. CODE ANN. § 311.67, and his responsibility for the neglect of duty or misconduct of office of each of his deputies, *see* OHIO REV. CODE ANN. § 311.05, clearly indicate that the Sheriff can establish county policy in some areas. We conclude, therefore, that, in a proper case, the Sheriff's acts represent the official policy of Hamilton County and, as such, may be the basis for the imposition of § 1983 liability.[3]

[3] Although there appears to be no dispute, we also believe it is clear that the Prosecutor also establishes county policy.

This, however, does not end our inquiry. To impose liability upon the county, Pembaur "must identify the policy, connect the policy to the [county] and show that the particular injury was incurred because of the execution of that policy." *Bennett* v. *City of Slidell,* 728 F.2d 762, 767 (5th Cir. 1984) (en banc). We believe that Pembaur failed to prove the existence of a county policy in this case. Pembaur claims that the deputy sheriffs acted pursuant to the policies of the Sheriff and Prosecutor by forcing entry into the medical center. Pembaur has failed to establish, however, anything more than that, on this *one occasion,* the Prosecutor and the Sheriff decided to force entry into his office. *See Rowland* v. *Mad River Local School District,* 730 F.2d 444, 451 (6th Cir. 1984). That single, discrete decision is insufficient, by itself, to establish that the Prosecutor, the Sheriff, or both were implementing a governmental policy.[4] Accordingly, the district court properly dismissed the claim against the County.

III

We believe, however, that the district court erred in dismissing Pembaur's claim against the City. The district court concluded that the only policy or custom followed by officers of the Cincinnati Policy Division was that of

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[4] Pembaur's ratification theory is also insufficient to impose liability on the County. In *Turpin* v. *Mailet,* 619 F.2d 196 (2d Cir.), *cert. denied,* 449 U.S. 1016 (1980), which was cited by Pembaur, the Second Circuit recognized that a governmental policy could be established by ratification. That court held, however, that "absent more evidence of supervisory indifference, such as acquiescence in a prior pattern of conduct, a policy could not ordinarily be inferred from a single incident of illegality . . . ." *Id.* at 202. Pembaur has failed to prove any prior pattern of conduct.

aiding the deputies in the performance of their duties. This finding is clearly erroneous. Myron Leistler, the Chief of Police for Cincinnati, testified that the policy and past practice of his department was to use whatever force was necessary, including forcible entry, to serve a capias. He also testified that capiases are served routinely on the premises of persons who are not the subjects identified in the capiases. This testimony identifies the policy and connects that policy to the City. It is unclear, however, whether Pembaur's injury was incurred as a result of the execution of the policy. Because the district court erroneously identified the policy at issue, it did not make this determination. We therefore, remand this case to the district court to make this determination.

IV

For the reasons outlined above, we AFFIRM the dismissal of the claims against Whalen and the County. The dismissal of the claims against the City is VACATED and the case is REMANDED for proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-3325

BERTOLD J. PEMBAUR, M.D.,

Plaintiff-Appellant,

v.

CITY OF CINCINNATI, et al.,

Defendants-Appellees.

Before: KENNEDY and JONES, Circuit Judges; and COHN, District Judge.

JUDGMENT

(Filed October 18, 1984)

ON APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came on to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed in part, vacated in part and the case is remanded for proceedings consistent with this opinion.

Each party is to bear its own costs in this appeal.

ENTERED BY
ORDER OF THE COURT

/s/ JOHN P. HEHMAN, Clerk

Issued as Mandate: November 12, 1984

A True Copy.

Attest:

/s/ HENRY MacARTHUR
Deputy Clerk

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

C-1-81-412

BERTOLD J. PEMBAUR,

Plaintiff

v.

CITY OF CINCINNATI, OHIO, et al.,

Defendants

FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW

(Filed April 5, 1983)

This matter is before the Court following trial and the presentation of evidence and testimony. Plaintiff seeks damages from defendants for asserted violations of 42 U.S.C. § 1983 and the Fourth and Fourteenth Amendments of the Constitution of the United States. In accordance with Rule 52 of the Federal Rules of Civil Procedure, the Court does submit herewith its Findings of Fact, Opinion and Conclusions of Law.

Introduction

This litigation is but the latest in a long series of disputes between the plaintiff Bertold J. Pembaur and the State of Ohio, Hamilton County, Ohio and employees of each. The underlying dispute began in 1977 when the plaintiff herein, Bertold J. Pembaur, was indicted by the Grand Jury of Hamilton County, Ohio. The resulting criminal prosecution and collateral civil action have occupied the attention of the court system of Ohio, including the Courts of Common Pleas of Hamilton County, Ohio, the First District Court of Appeals of the State of Ohio and the Supreme Court of Ohio. The only issues presented to the Court concern a search of the premises of plaintiff on April 26, 1977 and an effort to serve two capiases issued by the Court of Common Pleas of Hamilton County, Ohio on May 19, 1977.

I. Findings of Fact

(A) The Parties

(1) Plaintiff Bertold J. Pembaur:

Bertold J. Pembaur is a doctor licensed to practice in the state of Ohio. He specializes in "family medicine." Dr. Pembaur maintains an office known as the Rockdale Medical Center, 430 Rockdale Ave., Cincinnati, Ohio. Within this center in 1977, Dr. Pembaur maintained a staff of approximately 20 persons. The bulk of Dr. Pembaur's income during the years preceding and immediately following 1977 was received from various welfare agencies for his treatment of persons who were entitled to welfare income. (Pltf's. Exs. 23, 24, 25, 26, 27a; Defs'. Ex. G). Dr. Pembaur was indicted by the Grant Jury of Hamilton County, Ohio in April of 1977 in a six-count indictment charging violations of Ohio Revised Code §§ 2913.02,

2913.51, 2923.03, 2921.31, 2921.32. Dr. Pembaur was subsequently acquitted of all counts of the indictment.

(2) Defendants:

a. The City of Cincinnati is a municipal corporation chartered in accordance with the Constitution of the State of Ohio. It maintains a police force with Myron Leistler as Chief. The office of Dr. Bertold Pembaur at 430 Rockdale Avenue is located within the municipal corporation limits of the City of Cincinnati.

b. Hamilton County, Ohio

Hamilton County, Ohio is one of 88 counties in the State of Ohio. It is located in the extreme southwestern corner of the state. The City of Cincinnati is a municipal corporation within Hamilton County. Pursuant to Chapter 305 of the Revised Code of Ohio, the County Commissioners at the time of this lawsuit were Norman Murdock, Robert A. Wood and Robert A. Taft, II. The Board of County Commissioners according to Ohio law is a quasi-corporation and constitutes both agents of the county and the county itself. *State ex rel Commissioners* v. *Allen,* 86 Ohio St. 244.

c. William P. Whalen, Jr.:

William P. Whalen, Jr. is an Assistant Prosecuting Attorney of Hamilton County, Ohio who was serving in 1977 under the elected Prosecuting Attorney Simon L. Leis, Jr. Mr. Whalen was appointed pursuant to Ohio Revised Code 309.06.

d. Russell Jackson:

Russell Jackson is a Secret Service Officer appointed by the Prosecuting Attorney of Hamilton County pursuant to Ohio Rev. Code 309.07. A Secret Service Officer in Ohio serves for such term as the Prosecuting Attorney deems advisable and he is subject to termination at any time by such Prosecuting Attorney. *Id.*

(B) The Incident of April 26, 1977

Defendant Russell Jackson appeared on the morning of April 26, 1977, before The Honorable Donald Schott, Judge of the Hamilton County Municipal Court and sought a search warrant asserting a violation of Ohio Rev. Code 2913.02 entitled "Theft of State Funds." (Joint Ex. 1). Pursuant to such affidavit, The Honorable Donald Schott issued a search warrant to the Police Chief of Cincinnati authorizing a search of the Rockdale Medical Center, 430 Rockdale Avenue, Cincinnati, Ohio and a specific search for "all medical filed (sic) of patients who are welfare recipients for the years 1975, 1976 and 1977 and billing records on all patients on welfare for the years 1975, 1976, 1977; accounts payable records for laboratory services for the years 1975, 1976, 1977; employment records for the years 1975, 1976, 1977; payroll records for the years 1975, 1976, 1977." In accordance with such search warrant, Mr. Jackson, accompanied by representatives of the Police Division of the City of Cincinnati and of the Ohio Department of Welfare, conducted a search of the premises and removed therefrom in excess of 30,000 individual records.

A taped inventory of the documents seized were given to attorney William Flax representing Dr. Pembaur, before May 1, 1977. On May 9, 1977 approximately 90% of all records obtained were returned to Dr. Pembaur.

On August 8, 1977 after an indictment was returned against Dr. Pembaur, a Motion was made on his behalf to suppress evidence. (Defs.' Ex. A). The Motion asserted deficiencies in the Affidavit for a search warrant and specifically violations of the Fourth, Fifth, Ninth and Fourteenth Amendments. On September 21, 1977, the Motion to Suppress was denied and an entry so finding was entered nunc pro tunc on September 21, 1977 (Defs.' Ex. B).

On April 29, 1977, a suit was brought on behalf of Dr. Pembaur in the Court of Common Pleas of Hamilton County, Ohio, No. A-7703347 (Defs.' Ex. E). Among other defendants were listed William Whalen, Assistant Prosecuting Attorney of Hamilton County, Ohio and Russell Jackson, Investigator for Prosecuting Attorney of Hamilton County, Ohio. Paragraph 9 of that Complaint provided as follows:

> That provided with such search warrant, the defendants Whalen, Jackson, Heavrin (Russell F. Heavrin of the Ohio State Highway Patrol) and others illegally seized all of the records listed therein and the equivalent personal records of the plaintiff for the same periods on April 26, 1977 and removed the same to the offices of the defendant, Leis (Simon L. Leis, Prosecuting Attorney of Hamilton County, Ohio) wherein they have been held ever since in violation of the Fourth and Fifth Articles of Amendment to the Constitution of the United States. . .

On March 25, 1980, the cause of action was dismissed for failure of the plaintiff to prosecute. *See* Ohio Civ. R. 41 (B). An entry dismissing the claim with prejudice was entered by the Court of Common Pleas. On June 3, 1981, the Court of Appeals for the 1st Appellate District of Ohio in Case No. C-800293 affirmed the dismissal by the trial

court but reversed its dismissal "with prejudice" and stated as follows:

> We hereby reverse the Judgment below. Rendering the judgment to which the appellant is entitled, we dismiss the Complaint herein without prejudice.

On July 21, 1982, the Supreme Court of Ohio reversed the Court of Appeals for the 1st Appellate District in *Pembaur* v. *Leis,* 1 Ohio St. 3d 89 (1982), stating:

> Pursuant to Civil Rule 42 (B) (1), it is not an abuse of discretion for the trial court to dismiss an action with prejudice for lack of prosecution when a plaintiff voluntarily fails to appear at a hearing without explanation when the Court has directed him to be present and his location is unknown. *Id.* at 92.

(C) The Events of May 19, 1977

(1) In the ensuing Grand Jury investigation of the charges against Dr. Pembaur, two employees of his, Marjorie McKinley and Kevin Maldon, were directed to appear before the Grand Jury. Ms. McKinley was directed to appear on May 19, 1977. Mr. Maldon was directed to appear on April 29, 1977. Neither witness did so appear and accordingly, two Judges of the Court of Common Pleas of Hamilton County, Ohio, separately issued capiases for the arrest and detention of each witness.

(2) The capias for Marjorie McKinley was issued by The Honorable Robert Gorman on May 19, 1977 (Joint Ex. II) and contained the following language:

> To the Sheriff of Hamilton County, Ohio: Upon receipt of a certified copy of this Entry Ordering Capias Issued For Witness, you are hereby commanded to take and to bring before this Court the witness, Marjorie McKinley, whose address is 1138 Laidlow Ave-

nue, to answer for contempt in failing or refusing to obey the command of a subpoena lawfully served on her in the within cause.

(3) A capias for the arrest and detention of Kevin Maldon was issued by The Honorable Robert Kraft, Judge of the Court of Common Pleas of Hamilton County, Ohio, on April 29, 1977 (Joint Ex. III) and it contained the following language:

> To the Sheriff of Hamilton County, Ohio: Upon receipt of a certified copy of this Entry Ordering Capias Issued For Witness, you are hereby commanded to take and to bring before this Court the witness Kevin Maldon, whose address is 865 North Hill Lane, to answer for contempt in failing or refusing to obey the command of a subpoena lawfully served on him in the within cause.

(4) Deputy Sheriff Frank Webb and David Lane attempted to serve the capiases upon the named individuals at their place of employment, Rockdale Medical Center, 430 Rockdale Avenue. The Sheriff's Deputies identified themselves as such but were denied entrance into the premises by plaintiff, Dr. Pembaur. Witness Marjorie McKinley was on the premises at the time. Witness Kevin Maldon was probably on the premises at the time. Plaintiff Dr. Pembaur refused to unlock a locked door and in addition further barricaded such door with a piece of wood. Dr. Pembaur summoned Officers of the Cincinnati Police Division and called members of the communications media including television station WCPO which thereupon sent representatives to the premises. The above-mentioned Sheriff's Deputies arrived at the premises at approximately 2:00 P.M., members of the Cincinnati Police Division appeared at approximately 2:20 P.M. Dr. Pembaur continued to refuse to permit entry into the premises and at some time between 4:00 and 4:15 P.M., the door in question was broken in and representatives of the Sheriff's office and the Cincinnati Police Division proceeded to search the premises. Neither witness McKinley nor Maldon were found on the premises. Defendant Whalen did not appear at the premises until after the door had been broken in and defendant Jackson at no time appeared upon Dr. Pembaur's premises on May 19th.[1]

II. Opinion

(A) Res Judicata

The liability of defendants in this action must first be examined in light of the previous litigation engaged in by the parties. Defendants have first argued that claims involving the April 26 search warrant and the evidence seized thereunder may not be considered by this Court in view of the previous entry denying a Motion to suppress such evidence in criminal case No. 771779-A and B (County Ex. B). It is the assertion of plaintiff, however, that based upon *United States* v. *Wallace* & *Tiernan,* 336 U.S. 793 (1949) and *Jones* v. *Saunders,* 422 F.Supp. 1054 (E.D. Pa. 1976), the denial of a Motion to Suppress does not prevent a reconsideration of the alleged Constitutional deprivation, particularly in view of the fact that plaintiff herein was acquitted. The Court notes in passing that

[1] The only other individually named defendants, Norman Murdock, Robert A. Wood and Robert A. Taft, II, were at the time of this lawsuit the County Commissioners of Hamilton County, Ohio. No personal participation in any of the events herein are attributed to such defendants. By stipulation of plaintiff, such defendants are listed in their official capacity only and as representatives of Hamilton County, Ohio.

United States v. *Wallace* & *Tiernan* does not deal with the situation herein presented and the determination of *Jones* v. *Saunders* is a determination of the United States District Court for the Eastern District of Pennsylvania which is not binding upon this Court.

It is not, however, necessary to reach this point. Defendants' second and more compelling *res judicata* argument involves Civil Case A-7703347 (County Ex. E). In that case, the Supreme Court of Ohio ultimately determined that the dismissal with prejudice for failure to prosecute was an adjudication on the merits of the matters urged in that action. Therefore, the principle of *res judicata* applies: "A final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were *or could have been* raised in that action." *Federated Department Stores, Inc.* v. *Moitie,* 452 U.S. 394, 398 (1981) (emphasis added).

The question of *res judicata* particularly bears upon the liability of defendant Russell Jackson, since his sole participation in the April 26 incident was an appearance before a Judge of the Hamilton County Municipal Court to obtain a search warrant and a participation in the search. The testimony is clear that Mr. Jackson was not present on May 19 when the two capiases were attempted to be served. There is no doubt that Paragraph 9 of County Defendant's Exhibit E deals with violations of the Fourth and Fifth Amendments to the Constitution of the United States. The paragraph states specifically:

> That provided with such search warrant, the defendants Whalen, Jackson, Heavrin and others illegally seized all of the records listed therein and the equivalent personal records of the plaintiff for the same period on April 26, 1977 and removed the same to the offices of the defendant Leis wherein they have been

> held ever since in violation of the Fourth and Fifth Articles of Amendment (sic) of the Constitution of the United States. . .

If indeed the search and seizure was a violation of the Fourth and Fifth Amendments in any respect, the final judgment in state court precludes such as assertion here. *Castorr* v. *Brundage,* 674 F.2d 531, 536 (6th Cir.), *cert. denied,* — U.S. — (1982).

(B) Good Faith

Defendant Whalen, as Assistant Prosecuting Attorney, is appointed by the Prosecuting Attorney to aid him in the performance of his duties. *See* Ohio Rev. Code § 309.16. When acting in his official capacity, the Assistant Prosecutor partakes of the same immunity from suit enjoyed by the Prosecuting Attorney. *See Macko* v. *Bryon,* 641 F.2d 447 (6th Cir. 1981).

It is clear that a prosecuting attorney under *Imbler* v. *Pachtman,* 424 U.S. 409 (1976), has absolute immunity in his role as a prosecutor. It is not equally clear whether a prosecuting attorney has absolute immunity in all of his activities. In *Imbler,* the Supreme Court of the United States made the following observation:

> We have no occasion to consider whether like or similar reasons require immunity for those aspects of the prosecutor's responsibility that cast him in the role of an administrative or investigative officer rather than that of advocate. . . *Id.* at 430.

However, even if a prosecutor's acts involve those aspects of his responsibility that fall outside the scope of his absolute immunity, he is still entitled to a qualified or "good faith" immunity. *See Scheuer* v. *Rhodes,* 416 U.S.

232 (1974); *Walker* v. *Cahalan,* 542 F.2d 681, 685 (6th Cir. 1976), *cert. denied,* 429 U.S. 1092 (1977).

Recently, the Supreme Court of the United States discussed the issue of good faith immunity. *Harlow* v. *Fitzgerald,* — U.S. —, 50 U.S.L.W. 4815 (June 24, 1982). Citing *Butz* v. *Economou,* 438 U.S. 478, the Court pointed out "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Id.* at 4817.

The Court considered a situation where a qualified immunity would not be available. Quoting *Wood* v. *Strickland,* 420 U.S. 308 (1975), the Court stated:

> We have held that qualified immunity would be defeated if an official *"knew or reasonably should have known* that the action he took within his sphere of official responsibility would violate the Constitutional rights of the [plaintiff] *or* if he took the action *with malicious intention* to cause a deprivation of Constitutional rights or other injury. . ." *Harlow, supra* at 4819. (emphasis and brackets in original).

Concluding that "bare allegations of malice" should not serve to subject officials to the costs of trial or the burdens of discovery, the Court held that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known. *Id.* at 4820. The Court reasoned:

> If the law at that time was not clearly established, an official could not reasonably be expected to anticipate subsequent legal developments, nor could he fairly be said to 'know' that the law forbade conduct not previously identified as unlawful. . . *Id.*

Citing *Pierson* v. *Ray,* 386 U.S. 547, 554 (1967), the Court concluded:

> Where an official could be expected to know that certain conduct would violate statutory or Constitutional rights, he should be made to hesitate. . . but where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken 'with independence and without fear of consequences.' *Harlow, supra* at 4820.

Under the foregoing standards, it is clear that defendant Whalen is shielded from liability for damages in connection with his activities on April 26 and May 19, 1977. His conduct did not in any way "violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.*

The Court has already concluded that plaintiff is barred by the doctrine of *res judicata* from asserting his claims against defendant Jackson in connection with the April 26, 1977, incident. In addition, however, the Court notes that defendant Jackson is also entitled to good faith immunity, under the same standards applied to defendant Whalen's actions. Furthermore, the rationale in *United States* v. *Ventresca,* 380 U.S. 102 (1965), appears to be pertinent. There, the Court made the following observation:

> If the teachings of the Court's cases are to be followed and the Constitutional policy served, affidavits for search warrants such as the one involved here must be tested and interpreted by Magistrates and Courts in a common sense and realistic fashion. They are normally drafted by non-lawyers in the midst and haste of a criminal investigation. Technical requirements of elaborate specificity once exacted under common law pleadings have no place in this area. A grudging or negative attitude by reviewing courts towards war-

> rants will tend to discourage police officers from submitting their evidence to a judicial officer before acting. *Id.* at 108.

The Court also stated:

> In our view, the Officers in this case did what the Constitution requires. They obtained a warrant from a judicial officer 'upon probable cause supported by oath or affirmation and particularly described the place to be searched and . . . things to be seized.' It is vital that having done so, their actions should be sustained under a system of justice responsive both to the needs of individual liberty and the rights of the community. *Id.* at 112.

It is clear that Mr. Jackson did precisely what the Court suggested in *Ventresca.* He prepared an affidavit and he appeared before a judicial officer who issued a search warrant. At that point, Mr. Jackson had done all that any law enforcement officer is required to do. An attempt to penalize him is contrary both to the principle of good faith immunity and to the law as set forth in *Ventresca, supra.*

The issue of good faith likewise bears upon the activities of other law enforcement officers on May 19th. Sheriff's Deputies, subsequently assisted by Officers of the Cincinnati Police Division, pursuant to capiases issued by Judges of the Court of Common Pleas of Hamilton County, Ohio used force to gain entrance into the Rockdale Medical Clinic.[2] On May 19, 1977, the law of this Circuit stated unequivocally that a law enforcement officer seek-

[2] Ohio Rev. Code § 2935.12 specifically authorizes an officer to "break down an outer or inner door" if he is refused admittance when executing an arrest warrant.

ing to execute a capias did not need a search warrant when he appeared upon the premises of a third person. *United States* v. *McKinney,* 379 F.2d 259 (6th Cir. 1967). Without question, such is no longer the law. *Steagald* v. *United States,* 451 U.S. 204 (1981). In view, however, of the observation of the Supreme Court in *Harlow, supra,* that "an official could not reasonably be expected to anticipate subsequent legal developments. . . .," and the fact that the activities of both the Deputy Sheriffs and the Cincinnati policemen were in accordance with the appropriate law at that time, an effort to hold them liable in connection with the May 19 incident must fail.

C. Liability of Local Governing Entities

Both the City of Cincinnati and Hamilton County, Ohio are parties defendant in this action. The law is clear that a municipal corporation is a "person" within the meaning of 42 U.S.C. § 1983[3] and may be liable thereunder. *Monnell* v. *New York City Department of Social Services,* 436 U.S. 658 (1978). The same is true of counties. *Monnell, supra,* at 690 (local government units "persons" under § 1983 if not part of state for Eleventh Amendment purposes); Ohio Rev. Code § 2743.01 ("state" defined not to include counties). *See also Mount Healthy Board of Edu-*

[3] 42 U.S.C. § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

cation v. *Doyle,* 429 U.S. 274, 280 (bar of Eleventh Amendment does not extend to counties.)

A local government may be liable under § 1983 if the action complained of implements or executes a policy statement, ordinance, regulation or decision officially adopted or promulgated by those whose edicts or acts may fairly be said to represent official policy. *Monnell, supra,* at 690, 694. In addition, local governments may be sued for Constitutional deprivation visited pursuant to governmental "custom" even though such custom has not received formal approval through the government's official decision-making channels. *Id.* at 690-91.

Here, there is no basis for holding Hamilton County liable. Assuming that the Sheriff's Deputies were acting pursuant to some policy on May 19, it was not a policy of Hamilton County *per se.*

The Hamilton County Board of County Commissioners, acting on behalf of the county, simply does not establish or control the policies of the Hamilton County Sheriff. The powers of a county sheriff in Ohio are set forth in Chapter 311 of the Ohio Revised Code. The duties and powers conferred upon these officials are not subject to review by the Board of County Commissioners. Sheriffs' policies are their own, their powers are set forth by the General Assembly of the State of Ohio and their office exists separate and apart from that of any other county official including the Board of County Commissioners.

This is not to suggest that there may never be an appropriate § 1983 action against Hamilton County and the Board of County Commissioners. Plaintiff in this matter, however, has elected in the one instance not to name the Prosecuting Attorney of Hamilton County as a party defendant and in the other instance to dismiss the Sheriff of Hamilton County as a party defendant. An attempt to

assert a § 1983 obligation upon the county itself for the specific action of county officials is not supported in this matter.

Similarly, there is no basis for holding the City of Cincinnati liable. Although the Supreme Court has held that a municipality "may not assert the good faith of its officers or agents as a defense to liability under § 1983," *Owen* v. *City of Independence,* 445 U.S. 622, 638 (1980), it remains the law that a city may be held liable only for those constitutional deprivations visited pursuant to policy or custom, whether official or unofficial. *Id.* at 633; *Monell, supra,* at 690-91. A city may not be held liable under a *respondeat superior* theory. *Id.* at 691, *Jones* v. *City of Memphis,* 586 F.2d 622 (6th Cir. 1978), *cert. denied,* 440 U.S. 914 (1979).

Here, the only policy or custom followed by officers of the Cincinnati Police Division on May 19 was that of aiding County Sheriff's Deputies in the performance of their duties.[4] This duty is prescribed by state statute. Ohio Rev. Code § 311.07 (B). The capiases involved were issued by a *county* court and were executed by *county* officers. Authorization to enter Dr. Pembaur's offices was obtained from a *county* official. Any participation by Cincinnati Police officers in the entry and search of Dr. Pembaur's offices could only have been the result of their own conclusions, based on their own judgment, regarding the permissible scope of their assistance.[5] An attempt to hold the City of Cincinnati liable for the judgments of its indivi-

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[4] The Court notes that Dr. Pembaur, not the county deputies, summoned the Cincinnati Police.

[5] Indeed, the lengthy delay between the arrival of the Cincinnati Police officers and the entry into Dr. Pembaur's offices indicates that those officers were unsure as to the proper procedure to be followed.

dual officers is an attempt to assert *respondeat superior* liability and must fail. *Monnell, supra,* at 691. *See also Leonhard* v. *United States,* 633 F.2d 599, 622 (2nd Cir. 1980), *cert. denied,* 451 U.S. 908 (1981).

III. Conclusions of Law

(A) This Court has jurisdiction pursuant to 42 U.S.C. § 1983.

(B) Plaintiff's claims against defendant Russell Jackson are barred by the doctrine of *res judicata.*

(C) Defendant William Whalen is entitled to good faith immunity from liability for his participation, as Assistant Prosecuting Attorney, in the incidents of April 26 and May 19, 1977. *Harlow* v. *Fitzgerald,* — U.S. —, 102 S.Ct. 2727 (1982); *Imbler* v. *Pachtman,* 424 U.S. 409 (1976); *Scheuer* v. *Rhodes,* 416 U.S. 232 (1974); *Walker* v. *Cahalan,* 542 F.2d 681 (6th Cir. 1976), *cert. denied,* 429 U.S. 1092 (1977).

(D) Defendant Russell Jackson is entitled to good faith immunity from liability, *Id.*

(E) Defendant Hamilton County Sheriff's Deputies and officers of the Cincinnati Police Division are entitled to good faith immunity for their activities in this matter. *Harlow* v. *Fitzgerald, supra; Scheuer* v. *Rhodes, supra.*

(F) Both Hamilton County and the City of Cincinnati are "persons" within the meaning of 42 U.S.C. § 1983. *Monnell* v. *New York City Dept. of Social Services,* 436 U.S. 658 (1978); *Mt. Healthy Board of Education* v. *Doyle,* 428 U.S. 274.

(G) Neither Hamilton County nor the City of Cincinnati is liable herein, as plaintiff suffered no Constitutional deprivation visited pursuant to a policy or custom of either entity.

(H) In accordance with the foregoing, plaintiff's Complaint should be and it is hereby DISMISSED at plaintiff's costs.

IT IS SO ORDERED.

/s/ CARL B. RUBIN
Chief Judge
United States District Court

NO. 84-1160

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1984

BERTOLD J. PEMBAUR, M.D.,
Petitioner,

vs.

CITY OF CINCINNATI, OHIO, HAMILTON COUNTY, OHIO, HON. NORMAN A. MURDOCK, HON. JOSEPH M. DECOURCY, JR., and HON. ROBERT A. TAFT, II,
Respondents,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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24 pp

QUESTION PRESENTED FOR REVIEW

CAN THE SINGLE, DISCRETE STATEMENT OF A COUNTY PROSECUTOR IN GIVING ADVICE TO A DEPUTY SHERIFF CONSTITUTE THE IMPLEMENTATION OF A COUNTY POLICY SO AS TO RENDER A COUNTY LIABLE UNDER 42 U.S.C. § 1983.

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1984

NO. 84-1160

BERTOLD J. PEMBAUR, M.D.,
Petitioner,

vs.

CITY OF CINCINNATI, OHIO, HAMILTON COUNTY, OHIO, HON. NORMAN A. MURDOCK, HON. JOSEPH M. DECOURCY, JR., and HON. ROBERT A. TAFT, II,
Respondents,

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

OPINIONS BELOW

The Opinion of the Court of Appeals, filed on October 18, 1984, is reproduced in Appendix A. The Findings of Fact, Opinion and Conclusions of Law of the United States District Court filed on April 5, 1983, is reproduced in Appendix B to the Petitioner's Brief.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 18, 1984. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOKED

CONSTITUTION OF THE UNITED STATES: FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983.

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of

Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (As amended December 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284).

STATEMENT OF THE CASE

In April, 1977 the Grand Jury in Hamilton County, Ohio, began an investigation of the Petitioner, Bertold J. Pembaur, M.D., involving his Rockdale Medical Center During the investigation two employees of Dr. Pembaur, Marjorie McKinley and Kevin Maldon, were directed to appear before the Grand Jury, but they failed to appear. Subsequent to their failure to appear, two separate judges of the Court of Common Pleas of Hamilton County, Ohio issued *capiases* for the arrest and detention of each witness. A *capias* was issued by Judge Robert S. Kraft on April 29, 1977 for Kevin Maldon and a *capias* was issued by Judge Robert H. Gorman on May 19, 1979 for Marjorie McKinley. (Joint Ex. II and III, Tr.p. 134).

On May 19, 1977, at approximately 2:00 p.m., Hamilton County Deputy Sheriffs Frank Webb and David Allen attempted to serve the *capiases* on Marjorie McKinley and Kevin Maldon at the Rockdale Medical Center, their usual place of employment (Tr.p. 49, 138). The two Deputy Sheriffs showed their identification but were denied admittance by Dr. Pembaur who not only closed the door, but also barricaded the door with a piece of wood. (Tr.p. 51.)

Dr. Pembaur called the Cincinnati Police Department and the news media to his office. After discussions with the County Sheriff's office and the County Prosecutor's office, the Deputy Sheriffs attempted to force the door but

they were unsuccessful. A Cincinnati Police Officer then took an axe and chopped a hole in the door. (Tr.p. 54.) Neither Marjorie McKinley nor Kevin Maldon were found although Marjorie McKinley was hiding on the premises and Kevin Maldon was probably on the premises. (Tr.p. 138, 139, Petitioner App. B, p. 18a). At no time did the County Prosecutor appear at the scene of the incident described above.

The Petitioner commenced an action pursuant to 42 U.S.C. § 1983 in the Southern District of Ohio, Western Division. The Trial Court ruled in favor of all Defendants and dismissed the Petitioner's Complaint.

The Sixth Circuit Court of Appeals affirmed the Trial Court's Decision as to Hamilton County, Ohio, but reversed as to the City of Cincinnati. The Sixth Circuit Court held that the Petitioner had suffered no constitutional deprivation at the hands of Hamilton County. The Petitioner failed to prove that he had suffered any constitutional deprivation pursuant to any policy, custom or practice of Hamilton County, Ohio.

From the Decision of the Sixth Circuit Court of Appeals the Petitioner has initiated the present action in this Court.

REASONS FOR DENYING THE WRIT

THE SIXTH CIRCUIT COURT OF APPEALS CORRECTLY HELD THAT A COUNTY POLICY IS NOT IMPLEMENTED BY A SINGLE, DISCRETE DECISION BY A COUNTY PROSECUTOR SO AS TO IMPOSE LIABILITY ON THE COUNTY UNDER 42 U.S.C. § 1983.

The Petitioner seeks to have this Court grant the Writ of Certiorari to consider whether a single, discrete decision by a County Prosecutor can be an implementation of a County policy so as to make the County liable under 42 U.S.C. § 1983 and the decision in *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

The Respondents believe that the Sixth Circuit Court of Appeals properly recognized and held that a single, discrete decision by the County Prosecutor is insufficient, by itself, to establish that the Prosecutor was implementing a County policy. (Appendix A at 8a).

The single, discrete decision which the Petitioner is relying upon is an alleged hearsay statement made by the County Prosecutor to the Deputy Sheriffs to "go in and get them" in the execution of the capiases for the arrest of two employees of the Petitioner in May 19, 1977.[1] The Prosecutor was not at the scene of the incident and had no other participation other than making a comment over the telephone.

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[1] The validity of the issuance and execution of the capiases involved was upheld by the Ohio Supreme Court in *State of Ohio* v. *Pembaur*, 9 OhioSt.3d 136 (1984) and was before this Court in the case of *Pembaur* v. *State of Ohio*, cert. denied, 104 S.Ct. 2668 (Case No. 83-1656, 1984).

At the time of the incident on May 19, 1977 court decisions in Ohio and the Sixth Circuit had held that arrest warrants could be executed at the home of a third person not named in the warrant without a search warrant. *United States* v. *McKinney,* 379 F.2d 259 (6th Cir. 1967). Further, Section 2935.12, Ohio Revised Code, permitted an officer to break down a door if the officer was refused admittance when executing an arrest warrant. The Prosecutor's policy of giving advice based upon what state and federal law permitted at the time surely should not be an unconstitutional policy on the part of the Prosecutor which somehow becomes the policy of Hamilton County, Ohio.

Further, such an isolated single statement by the County Prosecutor should not rise to the level of an unconstitutional policy on the part of Hamilton County, Ohio. Even assuming *arguendo* that the County Prosecutor's advice was illegal or unconstitutional, such a single incident should not establish County policy. *Turpin* v. *Mailet,* 619 F.2d 196 (2nd Cir., 1980) cert. denied 449 U.S. 1016 (1980). *Berry* v. *McLemore,* 670 F.2d 30, 32 (5th Cir., 1982).

Simply because a County official could set a County policy, every decision by that County official is not a "policy" of the County for which the County could be held liable under 42 U.S.C. § 1983. The Petitioner must not only establish that a single decision is a County policy, but also that the particular injury was incurred because of that policy. *Bennett* v. *City of Slidell,* 728 F.2d 762, 767 (5th Cir., 1984).

In *Rowland* v. *Mad River Local School District,* 730 F.2d 444, 451 (6th Cir., 1984), the Court held that there was no evidence that the single, discrete decision of the

school superintendent to suspend a teacher was the execution of a policy or custom for which the school district could be liable under 42 U.S.C. § 1983, even assuming that the school superintendent could set school board policy.

In the case before this Court, the Petitioner has failed to clearly establish that the hearsay statement of the County Prosecutor was a County policy and that the County policy thus established caused a constitutional deprivation. To accept the Petitioner's argument would mean that every decision and every statement made by a County official would establish County policy which could subject the County to liability under 42 U.S.C. § 1983.

The decision urged by the Petitioner would clearly go far beyond what was envisioned in *Monell, supra.* The one occasion on which the Prosecutor's office gave advice to the Sheriff's deputies in accordance with existing law should not be sufficient to establish that the Prosecutor was implementing a governmental policy for which the County could be liable under 42 U.S.C. § 1983.

CONCLUSION

For the reasons set forth above, the Respondents believe that the Decision of the Court of Appeals for the Sixth Circuit should be affirmed and the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-3325

BERTOLD J. PEMBAUR, M.D.,
Plaintiff-Appellant,

v.

CITY OF CINCINNATI; HAMILTON COUNTY; HON. NORMAN MURDOCK, COUNTY COMMISSIONER; HON. ROBERT A. TAFT, II, COUNTY COMMISSIONER; WILLIAM P. WHALEN, JR.; AND RUSSELL L. JACKSON,
Defendants-Appellees.

On Appeal from the United States District Court
for the Southern District of Ohio

Decided and Filed October 18, 1984

Before: KENNEDY and JONES, Circuit Judges; and COHN, District Judge.*

JONES, Circuit Judge. This matter is before the Court on the appellant's appe[illegible] from the district court's order dismissing his civil righ[illegible] action under 42 U.S.C. § 1983.

* The Honorable Avern Cohn, United States District Court for the Eastern District of Michigan, sitting by designation.

The appellant, Bertold J. Pembaur, a licensed doctor specializing in family medicine, maintains an offiice known as the Rockdale Medical Center (Center), which is located at 430 Rockdale Avenue in Cincinnati. During the spring of 1977, the Hamilton County Grand Jury indicted Pembaur in a six-count indictment. During the investigation of the charges, subpoenas were issued for the appearance of two of Pembaur's employees before the Grand Jury. These employees failed to appear at the designated time and capiases or writs of attachment were issued for their arrest.

On May 19, 1977, two deputy sheriffs from the Hamilton County Sheriff's Department appeared at the Center without a search warrant to serve the capiases which listed the employees' home addresses and not the Center's address. Upon their arrival, Pembaur refused to let them into the inner offices to search for the employees. In fact, he barricaded the door to those offices, called the press and the Cincinnati Police Department, and continued to refuse access to the inner offices.

Because of Pembaur's actions, one of the deputies called the Sheriff's office who advised him to call William P. Whalen, Jr., an assistant prosecuting attorney for Hamilton County. Simon Leis, prosecutor at the time, told Whalen to instruct the officers to serve the capiases. When the deputies were unsuccessful in their attempt to force the door, a Cincinnati police officer took an axe and chopped the door down which enabled the deputies and police officers to enter the inner offices. The employees, however, were not found.

Subsequently, Pembaur filed a civil rights action in the district court under § 1983 alleging deprivation of his Fourth and Fourteenth Amendment rights. Pembaur

named the City of Cincinnati (City), Hamilton County (County), the Hamilton County Commissioners in their official capacity (Commissioners), the Chief of the Cincinnati police department, the Hamilton County Sheriff, William Whalen, six unnamed Cincinnati police officers, two unnamed deputy sheriffs, and Russell Jackson, a Secret Service officer appointed by the county prosecutor pursuant to state law as defendants. After a bench trial, the district court made certain findings of fact and conclusions of law and, as a consequence, dismissed Pembaur's action in its entirety. On appeal, Pembaur raises only the dismissal of his claims against Whalen, the County, and the City as grounds for reversal.

In a case tried to the court, the district court's findings of fact will be set aside only if they are clearly erroneous. Fed. R. Civ. P. 52(a). A factual finding is clearly erroneous when, "although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 395 (1948); *Kennedy* v. *Commissioner*, 671 F.2d 167, 174 (6th Cir. 1982) (citing *United States* v. *United States Gypsum Co.*, 333 U.S. 364 (1948)). Ultimate findings of fact, however, are subject to *de novo* review, as are the district court's conclusions of law, because they require the application of legal principles. *See Roth Steel Products* v. *Sharon Steel Corp.*, 705 F.2d 134, 143 & n.19 (6th Cir. 1983). We turn now to a review of the district court's factual and legal findings.

I

As to Pembaur's claim against Whalen, the district court concluded that Whalen was entitled to at least a good faith immunity for his role in the events that led to the

lawsuit and that Whalen's actions had not violated any clearly established statutory and constitutional rights of Pembaur. Thus, the court held that Whalen could not be held liable for any damages.

On appeal, Pembaur concedes that Whalen was entitled to good faith immunity. He contends, however, that the district court erred in finding that Whalen's actions did not violate any clearly established constitutional right.

In *Harlow* v. *Fitzgerald,* 457 U.S. 800 (1982), the Supreme Court held "that government officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Id.* at 818. Thus, before applying the shield of good faith immunity we must make two determinations. First, we must determine what the applicable law was at the time of the alleged violation. Second, we must determine whether that law was clearly established. *Id.*

In *United States* v. *McKinney,* 379 F.2d 259, 263 (6th Cir. 1967), we held that a search warrant is not necessary to execute an arrest warrant on the premises of a third party if the authorities have probable cause to believe that the suspect could be found on the premises. We reasoned that "even if we were to accept appellant's premise that a search warrant must be obtained in the absence of exceptional circumstances, there is good reason to hold that the issuance of an arrest warrant is itself an exceptional circumstance obviating the need for a search warrant." Id. at 263 (footnote omitted). Pembaur asserts that this rule of law was changed in 1974 by this Court's opinion in *United States* v. *Shye,* 492 F.2d 886 (6th Cir. 1974). We disagree.

In *Shye,* we followed the D.C. and Fourth Circuits by

holding that a warrantless entry of a residence by authorities to effect an arrest was on the same constitutional footing as a warrantless entry to conduct a search; both are per se unreasonable absent exigent circumstances. 492 F.2d at 891, 893 (following *Dorman* v. *United States,* 435 F.2d 385 (D.C. Cir. 1970) (en banc); *Vance* v. *North Carolina,* 432 F.2d 984 (4th Cir. 1970)). We upheld the arrests in *Shye,* however, because we found that they were justified by exigent circumstances. *Id.* at 892. Pembaur's argument ignores a factual distinction between *Shye* and *McKinney;* the arrests in *Shye* were made *without* a warrant. The distinction is critical because *McKinney* indicated that the issuance of an arrest warrant itself could be "an exceptional circumstance obviating the need for a search warrant." 379 F.2d at 263. Consequently, *Shye* did not change the rule of *McKinney.* Indeed, that rule was not changed until four years *after* the actions complained of by Pembaur. *See Steagald* v. *United States,* 451 U.S. 204 (1981). Whalen's actions, therefore, did not violate any clearly established constitutional right. In fact, his instructions to the officers accorded with the law as it stood in 1977. Accordingly, he was entitled to the defense of good faith immunity and the dismissal of the damage claims against him was proper. No injunctive or declaratory relief was sought.

II

Pembaur also sought to impose liability on the County for the actions of the Sheriff and the Prosecutor. The district court, however, concluded that the County could not be held liable for the policies of the Sheriff because the Sheriff was not subject to the control of the Board of Commissioners (Board), the County's governing body. The court reasoned that the Sheriff's powers and duties were

established by the state legislature, a fact which presumably rendered them state officials. Although the district court did not decide whether the County could be held liable for the policies of the Prosecutor, it did hold that Pembaur suffered no constitutional deprivation as a result of county policy or custom.[1]

In *Monell* v. *Department of Social Services,* 436 U.S. 658, 694 (1978), the Supreme Court held that a local government can be liable in a § 1983 action when its official policy or governmental custom is responsible for a deprivation of constitutional rights.[2] Apparently recognizing that a local government's "official policy" can originate from more than one source, the Court stated ". . . it is when execution of a government's policy or custom, *whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy,* inflicts the injury that the government as an entity is responsible under § 1983." *Id.* (emphasis added). *See also Owen* v. *City of Independence,* 445 U.S. 657-58 (1980). Thus, the Board's lack of control does not necessarily preclude a finding of liability on the part of the County. We must determine whether the nature and duties of the Sheriff are such

[1] Because it is clear that authorities may not legally search for the subject of an arrest warrant in the home or office of a third party without first obtaining a search warrants, *Steagald,* 451 U.S. 204 (1981), we must read this language as indicating that, in the district courts view, the obvious constitutional violation that occurred in this case did not result from the policy or custom of either the County or City.

[2] The Court in *Monell* specifically noted that the § 1983 liability may not be premised upon a respondeat superior theory. 436 U.S. at 691; *accord Local No. 1903 UAW* v. *Bear Archery,* 617 F.2d 157, 160 (6th Cir. 1980).

that his acts may fairly be said to represent the county's official policy with respect to the specific subject matter.

Initially, we note that, the district court is incorrect to the extent that its decision implies that the Sheriff is not a County official. The Sheriff is elected by the residents of the County, OHIO REV. CODE ANN. § 311.01 (Baldwin 1982), and serves as the "chief law enforcement officer of the county." 1962 Op. Att'y Gen. No. 3109. He submits his budget requests to the Board, OHIO REV. CODE ANN. § 311.20, which in turn furnishes his office, books, furniture, and other materials. OHIO REV. CODE ANN. § 311.06. His salary and all training expenses are also paid out of the general county fund. OHIO REV. CODE ANN. §§ 325.01-06. Although none of these factors is itself determinative, we believe it is obvious that the Sheriff is a County official. Moreover, we believe that the duties of the Sheriff, as enumerated in OHIO REV. CODE ANN. § 311.67, and his responsibility for the neglect of duty or misconduct of office of each of his deputies, *see* OHIO REV. CODE ANN. § 311.05, clearly indicate that the Sheriff can establish county policy in some areas. We conclude, therefore, that, in a proper case, the Sheriff's acts represent the official policy of Hamilton County and, as such, may be the basis for the imposition of § 1983 liability.[3]

This, however, does not end our inquiry. To impose liability upon the county, Pembaur "must identify the policy, connect the policy to the [county] and show that the particular injury was incurred because of the execution of that policy." *Bennett* v. *City or Slidell,* 728 F.2d 762, 767 (5th Cir. 1984) (en banc). We believe that Pembaur failed to prove the existence of a county policy

[3] Although there appears to be no dispute, we also believe it is clear that the Prosecutor also establishes county policy.

in this case. Pembaur claims that the deputy sheriffs acted pursuant to the policies of the Sheriff and Prosecutor by forcing entry into the medical center. Pembaur has failed to establish, however, anything more than that, on this *one occasion,* the Prosecutor and the Sheriff decided to force entry into his office. *See Rowland* v. *Mad River Local School District,* 730 F.2d 444, 451 (6th Cir. 1984). That single, discrete decision is insufficient, by itself, to establish that the Prosecutor, the Sheriff, or both were implementing a governmental policy.[4] Accordingly, the district court properly dismissed the claim against the County.

III

We believe, however, that the district court erred in dismissing Pembaur's claim against the City. The district court concluded that the only policy or custom followed by officers of the Cincinnati Policy Division was that of aiding the deputies in the performance of their duties. This finding is clearly erroneous. Myron Leistler, the Chief of Police for Cincinnati, testified that the policy and past practice of his department was to use whatever force was necessary, including forcible entry, to serve a capias. He also testified that capiases are served routinely on the premises of persons who are not the subjects identified in the

[4] Pembaur's ratification theory is also insufficient to impose liability on the County. In *Turpin* v. *Mailet,* 619 F.2d 196 (2d Cir.), *cert. denied,* 449 U.S. 1016 (1980), which was cited by Pembaur, the Second Circuit recognized that a governmental policy could be established by ratification. That court held, however, that "absent more evidence of supervisory indifference, such as acquiescence in a prior pattern of conduct, a policy could not ordinarily be inferred from a single incident of illegality . . . ." *Id.* at 202. Pembaur has failed to prove any prior pattern of conduct.

capiases. This testimony identifies the policy and connects that policy to the City. It is unclear, however, whether Pembaur's injury was incurred as a result of the execution of the policy. Because the district court erroneously identified the policy at issue, it did not make this determination. We therefore, remand this case to the district court to make this determination.

IV

For the reasons outlined above, we AFFIRM the dismissal of the claims against Whalen and the County. The dismissal of the claims against the City is VACATED and the case is REMANDED for proceedings consistent with this opinion.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 83-3325

BERTOLD J. PEMBAUR, M.D.,

Plaintiff-Appellant,

v.

CITY OF CINCINNATI, et al.,

Defendants-Appellees.

Before: KENNEDY and JONES, Circuit Judges; and COHN, District Judge.

JUDGMENT

(Filed October 18, 1984)

ON APPEAL from the United States District Court for the Southern District of Ohio.

THIS CAUSE came to be heard on the record from the said District Court and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this court that the judgment of the said District Court in this case be and the same is hereby affirmed in part, vacated in part and the case is remanded for proceedings consistent with this opinion.

Each party is to bear its own costs in this appeal.

ENTERED BY
ORDER OF THE COURT
/s/ JOHN P. HEHMAN, Clerk

Issued as Mandate: November 12, 1984

A True Copy.

Attest:

/s/ HENRY MacARTHUR
Deputy Clerk

Office-Supreme Court, U.S.
FILED
JUL 31 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-1160

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BERTOLD J. PEMBAUR, M.D.,
Petitioner,

vs.

CITY OF CINCINNATI, OHIO, HAMILTON COUNTY, OHIO, HON. NORMAN A. MURDOCK, HON. JOSEPH M. DeCOURCY, JR., AND HON. ROBERT A. TAFT, II,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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JOINT APPENDIX

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PETITION FOR CERTIORARI FILED JANUARY 15, 1985
CERTIORARI GRANTED JUNE 17, 1985

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Findings of Fact, Opinion and Conclusions of Law and Decision of Court of Appeals are contained in Petition for Certiorari, Appendix B and A respectively.

UNITED STATES DISTRICT COURT
DOCKET ENTRIES

4-20-81	No. 1	COMPLAINT — Summons issued USM /abc
5-27-81	No. 5	ANSWER of defts Murdock, Wood, & Taft, II
3-17-83	No. 38	CIVIL MINUTES: Trial to the Court begins 3-14-83 before Judge Carl B. Rubin. All parties and counsel present. Mot. for separation of witness by pltf — GRANTED. Pltfs testimony begun, witnesses called, exhibits presented. Case is continued on 3-16-83 - 3-16-83 Plt mot. for mistrial is DENIED — Plts continues and rests. Motions to dismiss by both City and County defts is taken under advisement. Defts case commences on 3-17-83 and concludes. — Action is SUBMITTED. DEPOSITIONS USED IN TRIAL are as follows: William Whalen, Dr. Pembaur, Sheriff Lincoln Stokes, Russell Jackson. L Kuppin Ct. reporter
4- 5-83	No. 39	FINDINGS OF FACT, OPINION AND CONCLUSIONS OF LAW: pltf suffered no Constitutional deprivation pursuant to policy or custom of defts. Accordingly, Pltf's complaint is dismissed at plaintiff's costs
4- 5-83	No. 40	JUDGMENT ENTRY cmtc/ac
5- 3-83	No. 42	NOTICE OF appeal by pltf

GENERAL DOCKET
UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

1983

5/ 6 1) Copy Notice of Appeal, filed; and cause docketed.

1984

10/18 15) Judgment of the District Court is affirmed in part, reversed in part and the case is remanded for further proceedings, each party to bear its own costs (Kennedy, Jones and Cohn, JJ.)

10/18 16) Opinion by Jones, J.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-81-412

BERTOLD J. PEMBAUR, M.D.
430 Rockdale Avenue
Cincinnati, Ohio 45229

Plaintiff

vs.

CITY OF CINCINNATI,
an Ohio municipal corporation
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Cincinnati, Ohio 45202

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a County of Ohio
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Defendants

COMPLAINT
(Filed April 20, 1981)

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1. This is an action brought under 42 U.S.C. § 1983 and the statutory and common law of the State of Ohio by the Plaintiff for redress of the injuries suffered to his liberty and property through the deprivation of rights, privileges and immunities secured by the Fourth and Fourteenth Amendments to the Constitution of the United States and by the Constitution and laws of the State of Ohio.

2. The Plaintiff has been injured by the deprivation of his rights as a citizen to be secure in his property from trespasses, illegal searches and seizures, and by the deprivation of his right to be compensated for property taken from him.

3. Plaintiff has been deprived of his rights through the reckless, wanton, malicious, intentional, and willful acts of Defendants and their agents and employees and through the arbitrary, discriminatory and capricious abuse of public power.

4. Plaintiff's claims arise out of actions perpetrated under color of the laws of the State of Ohio and the political subdivisions and instrumentalities thereof.

5. Plaintiff seeks damages, compensatory and punitive, plus costs and attorneys' fees from Defendants herein for depriving Plaintiff of his rights.

JURISDICTION

6. This Court has jurisdiction over this action under 28 U.S.C. § 1343(3), 28 U.S.C. § 1331, and Article 3, § 2 of the Constitution of the United States. This action involves an amount in controversy, exclusive of interest, costs and attorney's fees, in excess of $10,000.00.

7. The injuries caused by Defendants and the acts perpetrated by the Defendants and their agents and employees occurred either entirely or in substantial part in Hamilton County, Ohio, which is in the Southern District of Ohio, Western Division.

8. This court has jurisdiction over the state law claims by virtue of its ancillary and pendant jurisdiction.

PARTIES

9. The Plaintiff, Bertold J. Pembaur, M.D., is a foreign-born citizen of the United States and a resident of Hamilton County, Ohio. He is a Doctor of Medicine, licensed to practice in the State of Ohio, and maintains an office for the practice of medicine known as the Rockdale Medical Center in Cincinnati, Ohio.

10. Defendants Norman Murdock, Robert A. Wood, and Robert A. Taft, II, are the duly elected Commissioners of Hamilton County, Ohio.

11. Defendant Lincoln J. Stokes, at the time of the events alleged herein, was the duly elected Sheriff of Hamilton County, Ohio, and still holds that office of public trust.

12. Defendant Myron J. Leistler, at the time of the events alleged herein, was the duly appointed Chief of Police for the City of Cincinnati, Ohio, and still holds that office of public trust.

13. Defendant William P. Whalen, Jr., at the time of the events alleged herein, was a duly appointed Assistant Prosecutor for Hamilton County, Ohio, and still holds that office of public trust. Said Defendant participated in the illegal searches and trespasses alleged herein, personally served war-

rants, and generally acted as an investigator and process server rather than as a prosecutor.

14. Defendant Russell L. Jackson, at the time of the events alleged herein, was a duly appointed Investigator for the Hamilton County Prosecutor's Office, and still holds that office of public trust.

15. Defendant John Doe One, at the time of the events alleged herein, was a duly appointed Cincinnati police officer who participated in the intrusion of Plaintiff's offices on April 26, 1977.

16. Defendants John Doe Two, John Doe Three, John Doe Four, John Doe Five and John Doe Six, at the time of the events alleged herein, were duly appointed Cincinnati police officers who participated in the intrusion into Plaintiff's offices on May 19, 1977.

17. Defendants John Roe One and John Roe Two, at the time of the events alleged herein, were duly appointed Hamilton County deputy sheriffs who participated in the intrusion into Plaintiff's offices on May 19, 1977.

18. Defendant Hamilton County is and was at all times alleged herein a Political Subdivision of the State of Ohio.

19. Defendant City of Cincinnati is and was at all times alleged herein a Municipal Corporation and political subdivision of the State of Ohio.

OPERATIVE FACTS

20. On April 26, 1977, a Cincinnati police officer, two State Highway Patrolmen and three employees of the State Welfare Department, Defendant Russell L. Jackson, and Defendant William P. Whalen, Jr. entered Plaintiff's offices at the Rockdale Medical Center to execute a search warrant. These individuals seized Plaintiff's property, including a vast number of medical records not covered by the warrant, and disrupted Plaintiff's office operations, rendering it impossible for Plaintiff to conduct his business of delivering medical care to his patients.

21. At approximately 2:00 p.m. on May 19, 1977, two Hamilton County Deputy Sheriffs arrived at Plaintiff's

Rockdale Medical Center in Cincinnati to execute two writs of attachment for the arrest of Marjorie McKinley and Kevin Maldon, M.D., employees of the Plaintiff, who were wanted as witnesses to appear before a Grand Jury.

22. Plaintiff, after reading the writs, refused to permit the Defendants or their agents or their employees to enter the private working area of the clinic and asked them to leave the premises.

23. Two Cincinnati police officers arrived and told the Plaintiff that the writs were in order and that he should permit Defendants and their agents and employees to enter the private working area of Plaintiff's office. Plaintiff again refused to permit them to enter the premises and ordered the Defendants and their agents and employees to leave.

24. At approximately 4:00 p.m., with five Cincinnati police officers and two deputy sheriffs present, the door to the private working area was broken down and destroyed by Defendants and their agents and employees, using an axe and a sledgehammer that were the property of the Fire Division of the Department of Safety of the City of Cincinnati. The Defendants and their agents and employees then illegally searched the clinic for the employees named in the writs. Defendant Whalen, again acting in his role as investigator rather than prosecutor, arrived on the scene and joined in the illegal search and trespass.

25. At no time did the Defendants or their agents and employees obtain or attempt to obtain a search warrant so as to legally enter on May 19, 1977 the premises of Plaintiff's clinic; nor did exigent circumstances require the immediate entry into Plaintiff's private offices to arrest the individuals named in the writs.

26. Each defendant and his agents and employees, under color of state law and not in good faith, acted outside the scope of his respective office or arbitrarily, unreasonably and grossly abused the lawful powers of his office to deprive the Plaintiff of his rights.

27. Defendants and their agents and employees, under color of state law and not in good faith, acted illegally, inten-

tionally, recklessly, willfully and wantonly and ordered their agents and employees to perform illegal acts for the purpose of depriving the Plaintiff of his rights. The supervisory officials who are named Defendants herein had the power and opportunity to exercise control over their subordinates but showed deliberate indifference to the deprivations of Plaintiff's constitutional and legal rights caused by their agents and employees.

28. Defendant Myron J. Leistler, when asked by a City Council member about the intrusion into the Plaintiff's offices on May 19, 1977, on behalf of himself and the City of Cincinnati ratified and approved the conduct of the City of Cincinnati police officers who participated in the illegal intrusion and trespass.

29. The County Commissioners and Hamilton County, through their legal department ratified and approved the conduct alleged herein of the Hamilton County Sheriff's Department, the Defendant Deputy Sheriffs, and Assistant Prosecutor William P. Whalen.

30. Plaintiff's business was irreparably injured due to the acts of Defendants and their agents and employees; these acts caused Plaintiff to lose patients, inhibited Plaintiff's ability to attract new patients, and interfered with Plaintiff's ability to conduct his profession in a normal and usual manner.

31. As a direct result of the actions of Defendants and their agents and employees, Plaintiff's health was seriously and permanently impaired; the Plaintiff also suffered temporary injury to his health which, at the time, caused him great pain, suffering and expense.

FIRST CAUSE OF ACTION

32. Plaintiff incorporates into this First Cause of Action all of the allegations of paragraphs 1 through 31 as if fully restated herein.

33. The entry, intrusion, and extensive search and seizure by Defendants and their agents and employees under color of state law on April 26, 1977 constituted a deprivation of Plaintiff's rights and privileges secured by the Constitution and laws of the United States. Therefore, Defendants are liable to Plaintiff in damages pursuant to 42 U.S.C. § 1983.

SECOND CAUSE OF ACTION

34. Plaintiff incorporates into this Second Cause of Action all the allegations paragraphs 1 through 33 as if fully restated herein.

35. Plaintiff, proprietor of the Rockdale Medical Center, had a right and privilege under the Fourth Amendment of the United States Constitution and the provisions of Article 1, § 14 of the Ohio Constitution and under § 2921.31, Ohio Revised Code, to prevent entry into the private portions of his office by Defendants and their agents and employees armed merely with writs of attachment for the purpose of searching for and seizing third persons named in those writs on May 19, 1977.

36. Defendants and their agents and employees, under color of state law, intruded upon Plaintiff's property, subjected Plaintiff to the deprivation of his rights and privileges secured by the Constitutions and laws of the United States and the State of Ohio. The Defendants are therefore liable to Plaintiff in damages pursuant to 42 U.S.C § 1983.

THIRD CAUSE OF ACTION

37. Plaintiff incorporates into this Third Cause of Action all of the allegations of paragraphs 1 through 36 as if fully restated herein.

38. Defendants and their agents and employees willfully and without compensating Plaintiff broke down the door to Plaintiff's private offices and deprived Plaintiff of rights secured by the Fourteenth Amendment of the United States Constitution and Article 1, § 19 of the Ohio Constitution by taking Plaintiff's property without just compensation.

39. Defendants and their agents and employees, under color of state law, deprived Plaintiff of his rights and privileges secured by the Constitutions and laws of the United

States and the State of Ohio. The Defendants are therefore liable to Plaintiff for damages pursuant to 42 U.S.C § 1983.

FOURTH CAUSE OF ACTION

40. Plaintiff incorporates into this Fourth Cause of Action all of the allegations of paragraphs 1 through 39 as if fully restated herein.

41. The entry and intrusion into Plaintiff's private office area on April 26, 1977 by defendants and their agents and employees went far beyond the scope of the search warrant which authorized that entry. Defendants and their agents and employees knowingly and willfully disregarded Plaintiff's constitutionally protected interests by searching areas not authorized in the warrant and by seizing documents and other items not authorized by the warrant.

42. These actions by Defendants and their agents and employees constituted a trespass for which Defendants are liable to Plaintiff in compensatory and punitive damages.

FIFTH CAUSE OF ACTION

43. Plaintiff incorporates into this Fifth Cause of Action all of the allegations of paragraphs 1 through 42 as if fully restated herein.

44. Defendants and their agents and employees did willfully and knowingly trespass and enter upon the premises owned by Plaintiff without leave or permission of Plaintiff and without privilege to do so on May 19, 1977.

45. This intentional trespass upon Plaintiff's property was done with a wanton, reckless and willful disregard of Plaintiff's rights. Therefore, Defendants are liable to Plaintiff for compensatory and punitive damages.

WHEREFORE, Plaintiff prays for compensatory and punitive damages against the Defendants for injuries to Plaintiff's property and property rights, for the temporary and permanent injury to Plaintiff's health, for the irreparable harm to his medical practice, for the legal expenses incurred by

Plaintiff, and for his pain and suffering in the amount of TEN MILLION DOLLARS ($10,000,000.00) actual damages and TEN MILLION DOLLARS ($10,000,000.00) punitive damages, plus interest, costs, expenses of litigation, including attorney's fees, plus whatever other relief in law or in equity to which the Plaintiff may be entitled.

/s/ Robert E. Manley
Trial Attorney for Plaintiff
Manley, Jordan & Fischer
4500 Carew Tower
Cincinnati, Ohio 45202
Telephone: (513) 721-5525

/s/ Timothy A. Fischer
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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-81-412

[Title Omitted in Printing]

ANSWER OF DEFENDANTS, HAMILTON COUNTY, LINCOLN J. STOKES, NORMAN A. MURDOCK, ROBERT A. WOOD AND ROBERT A. TAFT, II.

(Filed May 27, 1981)

Come now the Defendants, Hamilton County; Lincoln J. Stokes, Hamilton County Sheriff; and Norman A. Murdock, Robert A. Wood, Robert A. Taft, II, constituting the Board of County Commissioners of Hamilton County, Ohio; by and through counsel, and for their Answer state:

1) That they deny the allegations in numerical paragraphs one (1), two (2), three (3), four (4), five (5), six (6), seven (7), and eight (8) of the Complaint.

2) That in response to numerical paragraph nine (9) of the Complaint these Defendants admit that Bertold J. Pembaur, M. D., is a doctor of medicine licensed to practice in the State of Ohio, but they are without knowledge and information sufficient to form a belief as to the remaining allegations in numerical paragraph nine (9) of the Complaint.

3) That they admit the allegations in numerical paragraphs ten (10), eleven (11) and twelve (12) of the Complaint.

4) That in response to numerical paragraph thirteen (13) of the Complaint these Defendants admit that William P. Whalen, Jr., was and is a duly appointed Assistant Prosecuting Attorney of Hamilton County, Ohio, but these Defendants, specifically deny the remaining allegations in numerical paragraph thirteen (13) of the Complaint.

5) That in response to numerical paragraph fourteen (14) of the Complaint these Defendants state that Russell L. Jackson is a duly appointed Secret Service Officer for the Prosecuting Attorney of Hamilton County, Ohio, and as such conducts investigations for the Prosecuting Attorney.

6) That they are without knowledge or information sufficient to form a belief as to truth of the allegations in numerical paragraphs fifteen (15), sixteen (16) and seventeen (17) of the Complaint.

7) That they admit the allegations in numerical paragraphs eighteen (18) and nineteen (19) of the Complaint.

8) That these Defendants are without knowledge or information sufficient to form a belief as to the truth of the allegations in numerical paragraphs twenty (20), twenty-one (21), twenty-two (22), twenty-three (23) and twenty-four (24) and twenty-five (25) of the Complaint and, therefore, deny the same.

9) That they specifically deny the allegations in numerical paragraphs twenty-six (26) and twenty-seven (27) of the Complaint.

10) That they are without knowledge or information sufficient to form a belief as to the truth of the allegations in numerical paragraph twenty-eight (28) of the Complaint.

11) That they specifically deny the allegations in numerical paragraphs twenty-nine (29), thirty (30), and thirty-one (31) of the Complaint.

12) That in response to numerical paragraph thirty-two (32) of the Complaint these Defendants adopt and incorporate by reference, their Answer to numerical paragraphs One (1) through thirty-one (31) of the Complaint as if fully set out herein.

13) That they specifically deny the allegations in numerical paragraph thirty-three (33) of the Complaint.

14) That in response to numerical paragraph thirty-four (34) of the Complaint these Defendants adopt and incorporate by reference, their Answer to numerical paragraphs one (1) through thirty-three (33) of the Complaint as if fully set out herein.

15) That they specifically deny the allegations in numerical paragraphs thirty-five (35) and thirty-six (36) of the Complaint.

16) That in response to numerical paragraph thirty-seven (37) of the Complaint these Defendants adopt and incorporate by reference, their Answer to numerical paragraphs one (1) through thirty-six (36) of the Complaint as if fully set out herein.

17) That they specifically deny the allegations in numerical paragraphs thirty-eight (38) and thirty-nine (39) of the Complaint.

18) That in response to numerical paragraph forty (40) of the Complaint these Defendants adopt and incorporate by reference their Answer to numerical paragraphs one (1) through thirty-nine (39).

19) That they specifically deny the allegations in numerical paragraphs forty-one (41) and forty-two (42) of the Complaint.

20) That in response to numerical paragraph forty-three (43) of the Complaint these defendants adopt and incorporate by reference their Answer to numerical paragraphs one (1) through forty-two (42).

21) That they specifically deny the allegations in numerical paragraphs forty-four (44) and forty-five (45) of the Complaint and every other allegation of the Complaint not admitted to be true.

FIRST DEFENSE

22) The Complaint fails to state a claim against these Defendants upon which relief can be granted.

SECOND DEFENSE

23) The Court lacks jurisdiction over the person of these Defendants.

THIRD DEFENSE

24) The Court lacks jurisdiction over the subject matter of this action.

FOURTH DEFENSE

25) The Court lacks ancillary and pendant jurisdiction of the state law claims in this action.

FIFTH DEFENSE

26) The Plaintiff's claims are barred by res judicata and/or collateral estoppel.

SIXTH DEFENSE

27) The Plaintiff's claims are barred by the Statute of Limitations.

SEVENTH DEFENSE

28) The Plaintiff's claims are barred by Laches.

EIGHTH DEFENSE

29) These Defendants state that at all times stated in the Complaint they acted in good faith.

NINTH DEFENSE

30) These Defendants state that at all times stated in the Complaint they acted without malice.

TENTH DEFENSE

31) These Defendants state that at all times stated in the Complaint they acted pursuant to legal process and legal authority.

ELEVENTH DEFENSE

32) These Defendants state that they are immune from liability under the judicial immunity of the Court and/or the grand jury.

TWELFTH DEFENSE

33) These Defendants state that they are not liable to respond in damages in this action under the theory of respondeat superior.

THIRTEENTH DEFENSE

34) These Defendants state that at all times stated in the Complaint they were engaged in a governmental function for which they are immune from liability.

FOURTEENTH DEFENSE

35) These Defendants state that the Plaintiff has failed to mitigate his damages, if any damage can be proven.

FIFTEENTH DEFENSE

36) These Defendants state that all Defendants acted pursuant to a validly issued search warrant and/or arrest warrant and that all actions taken were done in the good faith belief that probable cause to believe a crime had been committed and that there was probable cause to make a search and to make arrests.

WHEREFORE, these defendants, having fully answered the Plaintiff's Complaint, ask that the Complaint be dismissed with prejudice at Plaintiff's cost, and for their costs and reasonable attorney fees in defending this action.

/s/ Simon L. Leis, Jr.
Prosecuting Attorney

/s/ Roger E. Friedmann
Ass't Prosecuting Attorney
420 Hamilton County Court House
Cincinnati, Ohio, 45202
Telephone: (513) 632-8537

ATTORNEYS FOR
DEFENDANTS,
HAMILTON COUNTY, LINCOLN
J. STOKES, ROBERT A. WOOD,
NORMAN A. MURDOCK, AND
ROBERT A. TAFT, II.

[Certification Omitted in Printing]

JOINT EXHIBIT II

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

IN RE: GRAND JURY INVESTIGATION

It appearing to the Court that one Marjorie McKinley was lawfully served with a subpoena to appear before the Grand Jury at 1:00 P.M. on the afternoon of the 19th day of May, 1977, and said Marjorie McKinley did not appear; and,

It further appearing to the Court that the Grand Jury was desirous in hearing from said witness; and,

It further appearing to the Court that the said witness did not appear at 1:00 P.M. on the 19th of May, 1977 before the Grand Jury; and,

The foreman of the Grand Jury having appeared before this Court on the 19th day of May, 1977 and represented that the said witness has failed to appear and testify and that the Grand Jury was still desirous in hearing from her.

IT IS THEREFORE ORDERED, by the Court, that a Capias be issued for the arrest and detention of said witness Marjorie McKinley until further order of this Court.

TO THE SHERIFF OF HAMILTON COUNTY, OHIO;

Upon receipt of a certified copy of this Entry Ordering Capias Issued For Witness, you are hereby commanded to take and to bring before this Court the witness, Marjorie McKinley, whose address is 1138 Laidlow Avenue, to answer for contempt in failing or refusing to obey the command of a subpoena lawfully served on her in the within cause.

IN WITNESS THEREOF, I have hereunto set my hand at Cincinnati, Hamilton County, Ohio this 19th day of May, 1977.

/ s /
JUDGE

JOINT EXHIBIT III

THE STATE OF OHIO, HAMILTON COUNTY
COURT OF COMMON PLEAS

IN RE: GRAND JURY INVESTIGATION

It appearing to the Court that the Grand Jury in Hamilton County currently has certain matters under investigation; and,

It appearing to the Court that one Kevin Maldon was lawfully served with a forthwith subpoena to appear before the Grand Jury on the morning of the 29th day of April, 1977, and said Kevin Maldon did not appear; and,

It further appearing to the Court that the Grand Jury was desirous in hearing from said witness and came before this Court earlier seeking a warrant for said witness; and,

It further appearing that one Jack Kelly, Attorney for the witness Kevin Maldon, then appeared and indicated that said witness would appear before the Grand Jury at 1:00 P. M.; and,

It further appearing to the Court that said witness did not appear at 1:00 P. M. on the 29th of April, 1977 before the Grand Jury; and,

The foreman of the Grand Jury having appeared a second time before this Court on the 29th day of April, 1977 and represented that the said witness has still failed to appear and testify and that the Grand Jury was still desirous in hearing from him.

IT IS THEREFORE ORDERED, by the Court, that a Capias be issued for the arrest and detention of said witness Kevin Maldon, until further order of this Court.

TO THE SHERIFF OF HAMILTON COUNTY, OHIO:

Upon receipt of a certified copy of this Entry Ordering Capias Issued For Witness, you are hereby commanded to take and to bring before this Court the witness Kevin Maldon, whose address is 865 North Hill Lane, to answer for

contempt in failing or refusing to obey the command of a subpoena lawfully served on him in the within cause.

IN WITNESS THEREOF, I have hereunto set my hand at Cincinnati, Hamilton County, Ohio this 29th day of April, 1977.

/s/

JUDGE

PLAINTIFF'S EXHIBIT 38

May 19, 1977

At approximately 2:07 p.m., we entered the office of Doctor Pembaur, at 430 Rockdale Avenue. Detective David Allen went to the reception window and I sat down in a chair to the right of the window. After a moment, Detective Allen told me he sees a lady fitting the description of Marjorie McKinley. I got up to look and Detective Allen pointed her to me. All we could see was she had dark hair and that she was wearing the same type of glasses that was described to us by the Ass't. Prosecutor, Bruce Gary. She was also wearing a very red blouse.

I sat back down and then a lady came to the window and asked Detective Allen if she could help him. He asked to see Mrs. Marjorie McKinley. The woman asked if he was a patient and he stated, "No, my name is David Allen." She then went to the woman seated and said, "Mrs. McKinley, there is a man to see you." She said, "Who?" She stated, "David Allen." Mrs. McKinley asked, "Who is David Allen?" The woman returned to the window and said, "Who are you David Allen?" He stated, "I am a policeman." With this the lady seated started to leave in a hurry, then Mr. Allen went to the side door of the reception room and was denied entrance by a black lady dressed in white.

I showed the black girl my ID and we asked to see Marjorie McKinley. The black lady stated that we could not come in and said to wait for the doctor to come. At that time I walked around to the window and a man, whom we found out later was the doctor, walked in by the black girl and together they suddenly shoved the door closed and he put the 2 x 6 board against the bottom part of the door. We tried to shove the door open but could not.

At that time the doctor stated he was calling the police. Detective Allen and myself decided to wait for the police to come before we did anything else. While we were waiting for the Cincinnati Police Department to arrive the doctor told us we had no right to be there and told us we had to leave the premises. He also told us that he had talked to his attorney's office and that he was on his way there.

The Cincinnati Police Department arrived and together we went back into the office and talked to Doctor Pembaur. We advised him that we had a legal Warrant, but he still refused to let us in. Specialist D'Erminio said he would call his Sergeant and we waited until he arrived. In the meantime I let Doctor Pembaur read the Warrants and he stated that they were illegal and the Judge had made a mistake in signing them. He said that everything that had happened was illegal.

Sergeant Ritter arrived and I showed him the Warrants and he tried to talk to Doctor Pembaur and told him if he didn't let us in we would have to break in the door. Doctor Pembaur then again said that Mr. Flax was on his way and for us to wait. We waited and I called my supervisor. He told me to call the Prosecutor and I talked to Mr. Whalen. He conferred with Mr. Leis and was told to tell me we had a legal Warrant and to go in and get her. At that time I went back to the doctor's office and told Detective Allen and Sergeant Ritter what the Prosecutor had said. He said he would like to get another opinion and called his lieutenant. After he had talked to him we went to Doctor Pembaur and advised him again and he still refused to let us in. We waited a while longer for Mr. Flax. Then the second shift Relief Sergeant came and talked to Sergeant Ritter. After a few minutes Sergeant Ritter left. The other sergeant talked to Doctor Pembaur and then we waited a while longer for Mr. Flax to arrive.

At approximately 4:05 p.m. we advised Doctor Pembaur to open the door or we would have to knock it down to get inside. He told the Cincinnati Police Department they had no business there and they should let Detective Allen and myself do it. Detective Allen and I attempted to bust it down, but to no avail. The Sergeant sent Patrolman Fox to get an axe. We waited until Patrolman Fox returned and then Specialist D'Erminio proceeded to chop it down. After the door was opened we went in.

Doctor Pembaur and his nurses attempted to keep us from approaching the lady in question by stepping in front of us and saying, "Go ahead and shove me out of the way." We

walked past them and to the lady we thought was Mrs. McKinley. I asked her if she was Mrs. McKinley and she said, "No." I asked her to let me see some ID. At first she hesitated because the other nurses told her not to, then she showed me a driver's license belonging to a Miss Krausce.

Detective Allen went to call Mr. Lally about bringing her downtown because she did fit the description of Mrs. McKinley. Detective Allen was told that Mr. Whalen was on his way to identify Mrs. McKinley. While we were waiting for Mr. Whalen to get there, Doctor Pembaur walked me through the office. I asked him to open his office door but he refused by turning and walking up the hallway. He did show me all the rooms that were open, but would not open any doors that were closed.

Mr. Whalen arrived at approximately 4:20 p.m. We went into the office and Mr. Whalen went to the lady we thought might be Mrs. McKinley. He said, "No, that is not her," and then we left the premises.

At approximately 4:40 p.m., we arrived at 1138 Laidlaw Avenue. We knocked on the door and got no response, although there was a boy lying on the couch. After pounding on the door a few times, Mr. McKinley finally opened the door. He said his wife was at work and he let me come into the house to look around. I was satisfied she was not there and we left. We returned to the Court House to drop off Mr. Whalen.

/s/ Franklin D. Webb
/s/ David Allen

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-81-412

[TITLE OMITTED IN PRINTING]

Before:

The Honorable Carl B. Rubin,
Chief Judge
Cincinnati, Ohio
March 14 thru 17, 1983

* * *

TESTIMONY OF WILLIAM WHALEN
AS ON CROSS EXAMINATION

[12] * * *

Q. Do you recall talking to Mr. Leis that day about the access to the Pembaur Office?

A. Yes, sir.

Q. What was the nature of that conversation?

A. I went in and relayed to him a conversation I had with one of the deputies and relayed word from him back to the deputy.

Q. What were the facts you gave Mr. Leis?

A. Told him that the officer had called and stated that the doctor would not permit admission to the office.

Q. What were the instructions you relayed back to the officer?

A. That Mr. Leis said go in and look for him.

Q. Did the officer ask for any further clarification?

A. Yes, sir.

Q. What was your answer?

A. I repeated what Mr. Leis had said.

* * *

TESTIMONY OF FRANK WEBB
AS ON CROSS EXAMINATION

[51] The black lady was standing there talking to us. We showed her our I.D., and she said something along — wait for the doctor to come in. So I went back around in front of the reception at the window. I saw a man, who now I know as Dr. Pembaur, come to the side door and together, he and the black girl slammed the door shut and Dr. Pembaur picked up a heavy piece of wood and wedged it down between the door and the wall. I went back around and we tried to bump against the door but it didn't do any good.

We came back over in front of the receptionist window again, and we both at that time showed Dr. Pembaur our identification and told him why we were there.

THE COURT: Mr. Webb, let me make sure I understand you. Dr. Pembaur impeded you in going through that door?

THE WITNESS: Dr. Pembaur put the board down and wedged the door to where we could not get it open.

THE COURT: There's no question in your mind as to who that was, is that correct?

THE WITNESS: None at all.

THE COURT: Dr. Pembaur is in the courtroom; can you point him out?

THE WITNESS: Sure, that's him right there in the blue suit with the glasses.

By Mr. Manley:

[52] Q. Then what happened?

A. Well, we showed Dr. Pembaur our identification and while we were there, we told him why we were there. We showed him the papers. He said they were all illegal. We had no business being there and we should leave the premises.

We attempted to get him to read the papers. I'm not sure if he did at that time or not, but he did tell us he was going to call the police, so we said, go ahead, call the police. So where he went out — I'm not sure if we went completely out of the reception office or not, but we backed away from the reception window and waited for the Cincinnati Police to get on the scene.

They finally came and we showed them our identification and we showed them the papers that we had. With the Cincinnati Police, Mr. Allen and myself went back into the office, again, we approached Dr. Pembaur, we told him what the papers was, the Cincinnati policeman that were there told him they were legal papers and we should be able to enter and if Mrs. McKinley is in there, to bring her out.

Dr. Pembaur repeatedly refused to let us in, saying it was all illegal. The Judge was wrong in signing the papers, and he had called his attorney, who I believe at the time, was Mr. Flax. And he was enroute. So my partner and I decided we would wait a little while for Mr. Flax to [53] arrive. While we were waiting, one of the Cincinnati policeman called for a supervisor. A few minutes later, a Sargeant arrived on the scene. We identified ourselves to the Sargeant, showed him the papers that we had and he, with us, went back in the office. We showed Dr. Pembaur the papers. We read the papers to Dr. Pembaur.

I'm not sure if at that time or previously, but Dr. Pembaur had taken the papers himself and read them. Sargeant, of course, tried to get Dr. Pembaur to open the door so we could come in. He wouldn't open the door; he said his lawyer was on the way, so we waited awhile longer. I think at that time is when we decided we better call our office. So we called our office and we talked to Ed Lalli, who at the time was the execution officer and we talked to him. He in turn told us to call the Prosecutor's Office and gave Mr. Whalen's phone number to us.

We called Mr. Whalen, told him what the situation was, and he said, I'm not sure if he wanted us to call him back or if he just put us on hold, and went to talk to Mr. Leis or if we

called him back, and then he talked to us or whatever. In that respect, I'm not really sure of it. But anyway, Mr. Whalen told us that he had talked with Cy Leis and Cy Leis said to go in and get her. So we went back over to the office and we talked to the Cincinnati Police. It was, I guess, around three or a little before, but anyway it [54] was time for a shift change for the Cincinnati police. They called — I don't know who called, but they called and another Sargeant came and the other one left.

We showed him our I.D. We explained our situation and gave him the papers. He in turn went in and talked to Dr. Pembaur, tried to get him to open the door for us, which, of course, he refused to do.

We told the officer that Cy Leis had said to go in and get them and Dr. Pembaur said, again, I'm not sure just exactly how it was all brought out, but he then again said his lawyer was there. Wait for his lawyer to come, that he was on his way.

So we did wait for awhile longer, and then together, we went back to Dr. Pembaur, we advised him that if he didn't open the door and let us come in, that we had been told by the prosecutor to go in and get them. At that time, I'm not sure exactly how it was said, but Dr. Pembaur made a statement through the glass, alright, let the two deputy sheriffs knock the door down or something along that line. I'm not exactly sure what the words were.

Anyway, Officer Allen and myself went around to the door and together, we butted up against it, two or three times, I guess, and of course, we couldn't do anything with it. At that time we just moved away and the Cincinnati policeman took the axe and chopped the door down.

[55] Once the door was down, we went in to the back part of the office. We went to the young lady that was there that we thought was Mrs. McKinley, we asked her who she was and she told us a name, which I can't tell you right who it is, but she produced a drivers license with her picture and her name. We then knew, of course, it was not the lady we was looking for.

We talked to Dr. Pembaur, and he then showed me around the office itself, walked with me all through the office. We looked in each of the little offices that was there, I think, and we — I don't think we attempted to even open any doors that were closed. Anyway, we came back into the other part of the office and I imagine maybe five minutes later, Mr. Whalen came on to the scene, we saw him, we walked over to him and took him to the young lady that was in question. He said no, that's not her. We left.

Mr. Whalen, Officer Allen and myself went out and got in the car and went out to Laidlaw Avenue, supposed to be the residence of Mrs. McKinley. We found it on the door, finally we got a response, a man identified himself, I think as her husband. I'm not sure. But he told us to come in and I walked around the premises. He said his wife was not there, that his wife was at work. So we left Laidlaw Avenue and came back downtown. I dropped off Mr. Whalen, and Mr. Allen and I went on home.

[56] THE COURT: How long elapsed between the time that you came to Dr. Pembaur's office and the door was broken open?

THE WITNESS: I'd say close to two hours.

By Mr. Manley:

Q. Did you understand the instructions that were given to you by Mr. Whalen relayed from Mr. Leis to include chopping down the door?

MR. FRIEDMANN: Objection.

THE COURT: Sustained.

Q. During that two hour period, did you make any request for a search warrant?

MR. FRIEDMANN: Objection, Your Honor.

THE COURT: I don't see the relevance of that, Mr. Manley. What difference does it make whether they requested a search warrant or not if they had a capias?

Q. Did Mr. Whalen bring with him a search warrant when he came out?

MR. FRIEDMANN: Objection.

THE COURT: Sustained. There's just one issue here.

Was there a violation of this plaintiff's constitutional rights by an attempt to serve a capias? That's all.

Q. In the past, have you served capiases on property of persons other than the object or the subject of the [57] capias?

A. Yes.

Q. Have you done that without a search warrant in the past?

A. Yes.

Q. On occasion, have you used force to do that in the past?

A. Never.

* * *

TESTIMONY OF SHERIFF LINCOLN STOKES
AS ON DIRECT EXAMINATION

[216] * * *

Q. On the basis of your review of Exhibit 38 and whatever other information you received from your subordinates, did you make a judgment as to whether or not your deputies on the 19th of May, 1977 adhered to the policies of your department at Dr. Pembaur's office?

A. I made judgments from information submitted to me and it was my judgment that the deputies acted fully and competently within their authority.

Q. Do you have a policy whether a deputy has a question as to what he should do, what your policy is with respect to that?

A. What timeframe?

Q. In 1977.

A. In answer to that, the policies and procedures are set out by the Ohio Revised Code, and any court decisions relating to such activities are reviewed and furnished to the deputies working that particular type of job.

* * *

[218] • • •

Q. Was there a policy to consult the Prosecutor's Office?

A. The policy to consult the Prosecutor's Office is determined upon the facts, circumstances and situations of each case. I cannot answer your question in a generality, because every aspect of the incident to be reviewed has to be considered.

Q. Well, in this particular case, was it a violation of your policy for the Deputy Lalli to refer the Deputy Webb to the Prosecutor's Office?

A. I would not consider that a violation of a Sheriff's Office policy. However, you have to consider each situation upon its own facts and circumstances.

Q. Then was that in conformity with your policy?

A. I had no objection to it and under the circumstances, I thought it was the proper thing to do.

• • •

TESTIMONY OF WILLIAM WHALEN
AS ON DIRECT EXAMINATION

[365] • • •

Q. Mr. Whalen, with regard to May 19, 1977, are you [366] aware that certain deputy sheriffs arrived at Dr. Pembaur's office on that day to serve a capias?

A. I was not aware until they called me on the telephone.

Q. Do you know approximately what time they called you?

A. I believe the first time was some time after two in the afternoon.

Q. What did they relate to you?

A. That they were out there and they had been denied entry, and believed that the two people they were looking for were inside and wanted to know what to do.

Q. What did you tell them?

A. I put Frank Webb on hold and went in and talked with Mr. Leis; Mr. Leis told me to tell them to go in and get them. I relayed those words to Deputy Webb over the telephone.

• • •

[367] • • •

Q. Mr. Whalen, in your position as an Assistant Prosecuting Attorney you are familiar with certain case law and decisions that are rendered by certain courts?

A. Yes, sir.

Q. On May 19, 1977, did you believe that a deputy sheriff with a lawfully issued capias could go on to the premises of a third person to execute that capias?

A. Yes, sir, I did.

Q. To your knowledge, was there ever any other situation where the deputy sheriffs had been faced with a [368] situation where they had a capias for the arrest of a person and they had gone on to the premises of a third person and were denied entrance and had to use force to gain entrance?

A. I've never experienced any.

Q. In all your time as an Assistant Prosecuting Attorney?

A. That's correct. I'm aware of no instance.

• • •

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF OHIO
WESTERN DIVISION

Case No. C-1-81-412
(Rubin, J.)

[TITLE OMITTED IN PRINTING]

STIPULATION

It is hereby stipulated and agreed by and between the undersigned attorneys for the respective parties hereto that the following facts may be admitted into evidence without further testimony.

1) That Marjorie McKinley was employed by Dr. Bertold J. Pembaur at the Rockdale Medical Center on May 19, 1977.

2) That Marjorie McKinley was at the office of Dr. Bertold J. Pembaur at the Rockdale Medical Center performing her duties on May 19, 1977.

3) That Marjorie McKinley was at the Rockdale Medical Center on May 19, 1977 when two Hamilton County Deputy Sheriffs arrived to serve a capias on her.

4) That after the arrival of the two Deputy Sheriffs she went to a stairway going to the second floor of the building where the Rockdale Medical Center is located.

5) That after the departure of the Deputy Sheriffs and police officers Marjorie McKinley came out of the stairway and back into the offices of the Rockdale Medical Center.

IT IS SO STIPULATED.

/s/ Andrew S. Lipton
Trial Attorney for Plaintiff

/s/ Roger E. Friedmann
Ass't Prosecuting Attorney
Trial Attorney for Defendants,
Whalen, Jackson and Hamilton
County

Jerome Luttenegger
Ass't City Solicitor
Trial Attorney for
City of Cincinnati

[Submitted to the Court (R.4)]

No. 84-1160

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BERTOLD J. PEMBAUR, M.D.,
Petitioner,

vs.

CITY OF CINCINNATI, OHIO, HAMILTON COUNTY, OHIO, HON. NORMAN A. MURDOCK, HON. JOSEPH M. DeCOURCY, JR., AND HON. ROBERT A. TAFT, II,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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BRIEF OF PETITIONER

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PETITION FOR CERTIORARI FILED JANUARY 15, 1985
CERTIORARI GRANTED JUNE 17, 1985

QUESTION PRESENTED

Can a single, discrete decision of an elected county prosecutor which directly causes an unconstitutional search of a private medical office fairly be said to represent official policy so as to render a county liable under 42 U.S.C. § 1983?

PARTIES TO THE PROCEEDING

The parties to the proceedings in the Court of Appeals include those parties named as respondents in the caption of this case: the City of Cincinnati, Ohio; Hamilton County, Ohio; and Honorable Norman A. Murdock, Honorable Joseph M. DeCourcy, Jr., and Honorable Robert A. Taft, II, who are the Board of County Commissioners for Hamilton County, Ohio, sued in their official capacity as the county itself. *State ex rel. Board of County Commissioners of Marion County* v. *Allen*, 86 Ohio St. 244, 99 N.E. 312 (1912); Findings of Fact, Opinions and Conclusions of Law (Petition Appendix B at 14A).

Defendant William Whalen, Assistant Prosecuting Attorney for Hamilton County, Ohio, was an appellee in the Sixth Circuit Court of Appeals proceedings. The District Court granted judgment on his behalf on the grounds that he was entitled to qualified immunity from liability. The Court of Appeals affirmed the judgment as to defendant Whalen. Petitioner did not seek a writ of certiorari as to the issue of that defendant's entitlement to qualified immunity.

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BRIEF OF PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals, filed October 18, 1984, is reproduced in Appendix A to the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. That decision also appears at 746 F.2d 337 (6th Cir. 1984).

The Findings of Fact, Opinion and Conclusions of Law of the United States District Court, filed on April 5, 1983, is reproduced in Appendix B to the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 18, 1984. The Petition for Writ of Certiorari was timely filed in the Supreme Court of the United States on January 15, 1985. The Petition for Writ of Certiorari was granted on June 17, 1985. The jurisdiction of this Court is founded upon 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. § 1983. Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any

citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (As amended December 29, 1979, P.L. 96-170, § 1, 93 Stat. 1284.)

STATEMENT OF THE CASE

A. Facts

Petitioner, Bertold J. Pembaur, M.D., is licensed to practice medicine by the State of Ohio and specializes in family medicine; he has been practicing in the City of Cincinnati since 1958. (R. 61-62.) The doctor is the sole proprietor of a medical office known as the Rockdale Medical Center, located in the City of Cincinnati, Hamilton County, Ohio. (R. 62.)

Two unidentified persons dressed in plain clothes arrived in the reception area of petitioner's medical office on May 19, 1977, and sought to enter the inner offices. Learning of this, Dr. Pembaur barred shut the door between the public reception area and the private working areas of the medical office. (R. 51, 69-70.) Dr. Pembaur was then told that the two individuals were deputy sheriffs armed with capiases[1] to bring

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[1] A capias is a writ of attachment issued purusant to Ohio Rev. Code Ann. Section 2417.21 to have a sheriff bring a person before the court or notary before whom a subpoenaed witness has failed to appear to answer for civil contempt. In *State* v. *Pembaur*, No. C-790380, unreported (Hamilton County Court of Appeals Feb. 18 1981), see District Court Docket Entry 10, the state appellate court discussed the distinction between arrest and search warrants and capiases. As that Court noted, a capias may be issued by a notary public, there is no requirement for a neutral judge or magistrate, there need be no probable cause hearing, no affidavits or sworn testimony need be submitted, there is no limitation on hearsay and no restrictions on specificity. Thus, the court concluded that a

two of the doctor's employees before the grand jury. (Joint Exhibits II and III, R. 318, 319, 132-134, J.A. 20-21.) As both the trial court and the Court of Appeals recognized, each of the capiases set forth the home address for the persons sought, not the address of petitioner's private medical center. (Petition Appendix [hereinafter "P.A."] 2a; 17a-18a.)

The deputies asked the doctor to let them into the inner areas of the medical office to search for the named employees. Learning that the deputies had no search warrant (R. 48-49), Dr. Pembaur refused entry. (R. 52.) Shortly thereafter, Cincinnati police officers arrived in response to Dr. Pembaur's call. They too told the doctor to permit the deputies to enter to search for the persons named in the capiases. Dr. Pembaur again refused entry. (R. 52.) The police officers called for a supervisor, and when a sergeant arrived, he repeated the request to permit entry. (R. 53.) Dr. Pembaur continued to refuse to open his door absent a search warrant directed to him. (R. 53, 135.)

The deputies, pursuant to department policy, then called the sheriff's execution officer and were advised by him to call an assistant county prosecutor, defendant William Whalen. They called Whalen and advised him of the situation. Whalen spoke with Simon Leis, the Hamilton County Prosecutor, advised him of the situation and told him that petitioner would not permit entry; County Prosecutor Leis told Whalen to tell the deputies to "go in and get them." (R. 53-54, 366, Plaintiff's Exhibit 38, J.A. 23-25, R. 318, 319.) [2]

Finally, more than two hours after their arrival (R. 56), the deputies, still without a warrant and after again being refused entry, sought to batter against the door to break it

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capias is not the equivalent of either a search warrant or an arrest warrant. (Decision at 19-22.)

[2] Defendant Whalen, serving under the county prosecutor, was handling the grand jury at the time the capiases were sought. (R. 9, 11.) In addition, he arrived at the scene after the door had been axed open so as to identify the persons sought, if found. (R. 13-14.)

down. This failing, a Cincinnati police officer went to a fire station, obtained a fire axe and chopped the door down. (R. 54.) The deputies and police officers entered the private inner areas of the medical center and searched for the persons named in the capiases. (R. 55, 71.) The persons sought were not found. (R. 55.)[3]

One of the officers who had sought to execute the capiases, Deputy Sheriff Webb, testified that in the past he had frequently served capiases without a search warrant on the property of persons other than the subject of the capias. (R. 56-57.) While Sheriff Stokes testified that he could not recall a specific example, he assumed that forcible entries had been made in the past to serve capiases on the property of third persons. (R. 222-223.) In addition, the Sheriff testified that his deputies acted "fully and competently within their authority" (R. 216), and that the procedure followed by his deputies in calling the execution officer and then the prosecutor's office for advice was "the proper thing to do." (R. 218.) Defendant Whalen testified that the breaking down of

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[3] After the incident the prosecutor obtained from the grand jury an indictment of Dr. Pembaur for, "without privilege to do so," obstructing or delaying the deputies in the performance of "an authorized act within their official capacity." (Jt. Ex. IV, R. 318, 319)

Upon his conviction for this offense, the First District Court of Appeals for Hamilton County, Ohio, reversed on the ground that Dr. Pembaur enjoyed a constitutional privilege to be secure from unreasonable searches and seizures and that the deputies' warrantless search violated the Fourth Amendment. *State* v. *Pembaur*, No. C-790380, unreported (Hamilton County Court of Appeals Feb. 18, 1981), see District Court Docket Entry 10. While this decision was reversed on other grounds, *State* v. *Pembaur*, 69 Ohio St.2d 110, 430 N.E. 2d 1331 (1982), a second panel of the appellate court reached the same conclusion. *State* v. *Pembaur*, No. C-790380, unreported (Hamilton County Court of Appeals Nov. 3, 1982), See District Court Docket Entry 32. The Ohio Supreme Court, however, reinstated the conviction on the ground that the doctor had no right to refuse entry but rather was obliged to seek redress in a civil action for damages. *State* v. *Pembaur*, 9 Ohio St.3d 136, 459 N.E.2d 217 (1984), *cert. denied*, ____ U.S. ____, 104 S.Ct. 2668, 81 L.Ed.2d 373 (1984). Petitioner was acquitted of all other charges. (R. 83-84.)

Dr. Pembaur's door was not inconsistent with the Prosecutor's instructions. (R. 26-27.)

Petitioner commenced this civil rights action pursuant to 42 U.S.C. § 1983 in the Southern District of Ohio, Western Division, against Hamilton County, Ohio, the City of Cincinnati, Ohio, and against certain individuals alleged to have violated the doctor's constitutional rights. Jurisdiction was based on 28 U.S.C. §§ 1331 and 1343(a)(3). After a trial to the court, Judge Carl B. Rubin issued his Findings of Fact, Opinion and Conclusions of Law on April 5, 1983. The court ruled in favor of all the defendants, finding that the individual defendants were entitled to immunity and that the County and City were not liable because plaintiff had not suffered a constitutional deprivation committed pursuant to some official policy.

Upon appeal to the Sixth Circuit Court of Appeals, that court affirmed the trial court's holding as to Hamilton County, but reversed as to the City of Cincinnati, Ohio.

B. Trial Court's Judgment

The trial court found that assistant prosecuting attorney Whalen, the deputy sheriffs, and the City police officers involved in the forcible entry and search were all entitled to qualified immunity. (P.A. 23a-25a, 28a.) In addition, Judge Rubin found that the Hamilton County Board of County Commissioners is a "quasi-corporation" which "constitutes both agents of the county and the county itself" (P.A. 14a), and that the county was thus a "person" within the meaning of § 1983. (P.A. 25a, 28a.)[4]

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[4] There is simply no dispute that a county is amenable to suit under 42 U.S.C. § 1983. In *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658, 690 and fn. 54 (1978), it was noted that local government units not entitled to Eleventh Amendment immunity can be sued directly under § 1983. The Eleventh Amendment, of course, does not extend to counties. *Mt. Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 280 (1977); *Edelman* v. *Jordan*, 415 U.S. 651 (1974).

The trial court recognized that "[t]he capiases involved were issued by a *county* court and were executed by *county* officers. Authorization to enter Dr. Pembaur's offices was obtained from a *county* official." (P.A. 27a, emphasis in original.) Nonetheless, the trial judge concluded as a matter of law that plaintiff had "suffered no Constitutional deprivation visited pursuant to a policy or custom" of the county. (P.A. 28a-29a.) This holding was based on the reasoning that since the county commissioners do not establish or control the policies of the sheriff or prosecutor, the county itself could not be liable for the "specific action" of such officials. Rather, the court implied that this civil action should have been filed against the Sheriff or Prosecutor. (P.A. 26a-27a.)[5]

C. Decision of the Court of Appeals

The Sixth Circuit Court of Appeals reviewed the facts as they appear in the record, acknowledging that when Dr. Pembaur refused entry the deputy sheriffs called Assistant Prosecuting Attorney Whalen who was then instructed by the county prosecutor to tell the officers to serve the capiases. Only then were attempts made to forcibly enter the private medical office and a search conducted. (P.A. 2a.)

The Court noted that under *Steagald* v. *United States*, 451 U.S. 204 (1981), "it is clear that authorities may not legally search for the subject of an arrest warrant in the home or office of a third party without first obtaining a search warrant . . . ." The Court then characterized the action as an "obvious constitutional violation." (P.A. 6a fn. 1.)[6]

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[5] This proposition is of course incorrect. As this court noted in *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658, 690 fn. 55 (1978), and specifically held recently in *Brandon* v. *Holt*, ____ U.S. ____, 105 S.Ct. 873, 83 L.Ed.2d 878 (1985), a suit against an official in his official capacity is an action against the governmental entity. See also *Edelman* v. *Jordan*, 415 U.S. 651 (1974). Curiously, Judge Rubin had noted plaintiff's stipulation that the county commissioners had been sued only in their official capacity. (P.A. 19a fn. 1.)

[6] The county has never challenged this finding. In *Steagald*, this Court held that, absent exigent circumstances or consent, a search of a third per-

The appellate court rejected the District Court's conclusion that the policies of the sheriff and prosecutor cannot impose liability upon the county *per se*; the lack of control by the Board of County Commissioners over the sheriff and prosecutor "does not necessarily preclude a finding of liability on the part of the County." (P.A. 7a.) Rather, looking at the nature and duties of the officials, the court concluded that county policy may be established by both the sheriff[7] and the prosecutor. The court specifically recognized that "there appears to be no dispute . . . that the Prosecutor also establishes county policy." (P.A. 7a fn. 3.)[8]

The Sixth Circuit, however, affirmed the trial court's judgment as to the county on the ground that plaintiff had not shown that any county policy existed. Petitioner's proof of

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son's premises, conducted under authority of an arrest warrant, violates the Fourth Amendment. See also *Dunn* v. *State of Tennessee*, 697 F.2d 121 (6th Cir. 1982).

[7] The court recognized that the sheriff is an elected official under Ohio Rev. Code Ann. § 311.01 who serves as the "chief law enforcement officer of the county." The sheriff's budget for his office, furniture, books, all salaries, training and expenses is furnished by the county. Ohio Rev. Code. Ann. §§ 311.20, 311.06, 325.01-.02, 325.06-071. In addition, the duties of the Sheriff under Ohio Rev. Code Ann. § 311.67 and his responsibility for his officers under Ohio Rev. Code Ann. § 311.05 were noted. (P.A. 7a.)

[8] The Ohio Supreme Court has held that a county prosecutor is a county official whose election and duties are prescribed by statute. *State ex rel. Findley* v. *Lodwich*, 137 Ohio St. 329, 29 N.E.2d 959 (1940). Like the sheriff, the prosecutor is an elected county official, pursuant to Ohio Rev. Code Ann. § 309.01, whose budget is furnished from the county treasury. Ohio Rev. Code Ann. §§ 309.06, 325.11-13. The prosecutor has the specific statutory power to inquire into crimes and to prosecute complaints, suits, controversies and other matters. Ohio Rev. Code Ann. § 309.08. The prosecutor is also the "legal advisor" for all county officers. Ohio Rev. Code Ann. § 309.09. (A deputy sheriff has been held to be a county officer for purposes of § 309.09. See 1980 Op. Att'y Gen. Ohio 80-076 approving 1933 Op. Att'y Gen. Ohio 1750, p. 1603.)

Furthermore, in *Crane* v. *State of Texas*, 759 F.2d 412, 429-430 (5th Cir. 1985), the court held that an elected county attorney's decisions with respect to the use of capiases constitutes "official policy attributable to the County."

county policy failed only because Dr. Pembaur was the first victim of the decision of the Prosecutor to force an unconstitutional entry into the private medical offices.

> "We believe that Pembaur failed to prove the existence of a county policy in this case. Pembaur claims that the deputy sheriffs acted pursuant to the policies of the Sheriff and Prosecutor by forcing entry into the medical center. Pembaur has failed to establish, however, anything more than that, on this *one occasion*, the Prosecutor and the Sheriff decided to force entry into his office . . . That single, discrete decision is insufficient, by itself, to establish that the Prosecutor, the Sheriff, or both, were implementing a governmental policy." (P.A. 8a, citation omitted, emphasis in original.)

The Sixth Circuit, in adopting this novel rule denying relief to the first victim of an unconstitutional official policy, did not address relevant Supreme Court decisions; nor did it consider the legislative history and common law underpinnings for § 1983. Rather, the appellate court relied exclusively on its own prior ruling in *Rowland* v. *Mad River Local School District*, 730 F.2d 444 (6th Cir. 1984), *cert denied* __ *U.S.* __, 105 S.Ct. 1373, 84 L.Ed.2d 392 (1985) (P.A. 8a), involving a failure to rehire a non-tenured teacher because of her sexual preferences. *Rowland*, unlike the matter under consideration, did not involve a clear command by an elected policymaking official.[9]

This case is not one where the link between the governmen-

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[9] *Rowland*, in turn, relied solely on two other Sixth Circuit decisions, *Dunn* v. *State of Tennessee*, 697 F.2d 121, 128 (6th Cir. 1982), *cert. denied*, 460 U.S. 1086 (1983); and *Johnson* v. *Granholm*, 662 F.2d 449 (6th Cir. 1981), *cert. denied*, 457 U.S. 1120 (1982). Neither of these cases supports the decision reached in *Pembaur* where a policymaking official personally ordered the constitutional misconduct.

In *Dunn*, a state trooper and deputy sheriff conducted a non-consensual search of the plaintiff's home based upon a misdemeanor arrest warrant for the plaintiff's son. The son did not reside in the plaintiff's home, yet the officers, without direction or authorization from their superiors, forced entry,

tal entity and the constitutional violation is based upon some inference of an alleged official policy from a single wrongful act by non-elected employees or an allegation of inadequate hiring, training or supervision.[10] In such a case, the link between the alleged official policy and the wrongful conduct may indeed be tenuous. *City of Oklahoma City* v. *Tuttle*, ___ U.S. ___, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985). Rather, the wrong-doing in this case, the unconstitutional axing of the doctor's door and search of the private medical offices, was caused by the command of the elected county prosecutor to "go in and get them." (R. 53-54, 366.)

The sole issue before this Court is the Sixth Circuit's refusal to hold the county responsible for a constitutional deprivation caused by a clear command of an elected policymaking official. The appellate court has adopted a new form of governmental immunity, a "first bite" rule,[11] denying a § 1983

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searched the premises, and arrested plaintiff for interfering with a police officer. 697 F.2d at 123-124.

While the Court of Appeals recognized that the plaintiff had alleged a Fourth Amendment deprivation, 697 F.2d at 126, it held that the sheriff and the county were not proper defendants because there had been no direct involvement by the sheriff, no showing of direct responsibility for the officers' improper action, and because local governments may not be liable under § 1983 under the theory of *respondeat superior*. 697 F.2d at 128.

In *Johnson* v. *Granholm*, *supra*, 662 F.2d at 449-450, the court again simply stated that a county could not be held liable under § 1983 on a theory of *respondeat superior* where the county was a named defendant "solely on the ground that it was the employer of the individual defendants." While a prosecutor was a named defendant and found to enjoy absolute immunity, the gist of the plaintiff's case appears to have been the prosecutor's failure to deal with a husband's non-payment of child support rather than any specific decision as to a course of conduct to be followed by government employees.

[10] See, e.g. *Smith* v. *Ambrogio*, 456 F.Supp. 1130 (D. Conn. 1978); *Turpin* v. *Mailet*, 619 F.2d 196, 202 (2d Cir. 1980), *cert. denied*, 449 U.S. 1016 (1980); *Languirand* v. *Hayden*, 717 F.2d 220 (5th Cir. 1983); *Sanders* v. *St. Louis County*, 724 F.2d 665 (8th Cir. 1983); and *Gilmere* v. *City of Atlanta*, 737 F.2d 894 (11th Cir. 1984).

[11] The "first bite" rule is derived from English common law protecting a dog's owner from liability until after the animal has bitten someone and

remedy to the first victim of an unconstitutional official policy. It is this ultimate legal conclusion[12] that petitioner believes to be both incorrect and ill-advised.

SUMMARY OF ARGUMENT

This case presents the question of whether a single, discrete decision of an elected county prosecutor which directly causes an unconstitutional search of a private medical office may fairly be said to represent official policy so as to render a county liable under 42 U.S.C. § 1983. The Sixth Circuit Court of Appeals, in affirming the judgment of the trial court on the issue of the liability of Hamilton County, Ohio, enunciated a rule insulating units of local government from liability for the first incident of unconstitutional conduct authorized and directed by an elected official.

The Sixth Circuit has agreed that county policy may be established by the elected county prosecutor by virtue of the authority vested in the office by statute. To deny a remedy to the first victim of a constitutional deprivation caused by a decision of an elected official is to establish a "first bite" rule

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thus put the owner on notice of its dangerous propensities. *Smith* v. *Pelah*, 2 Strange 1264 (1747); *Charlwood* v. *Krieg*, 3 Carrington & Kirwan 46 (1851); *Burton* v. *Moorhead*, 8 Sess. Cas., 4th Ser. 892 (1881). See also *The Law Relating to Dogs*, Montague R. Emanuel, Stevens & Sons, Ltd., London (1908) at 4; and *The Principles of Legal Liability for Trespasses and Injuries By Animals*, William Newby Robson, University Press, Cambridge (1915) at 90.

That rule has been abrogated in this country for common-sense reasons.

> "To require that a plaintiff, before he can have redress for being bitten, should show that some other sufferer had previously endured harm from the same dog, would be always to leave the first wrong unredressed, and to lose sight of the thing to be proved, in attention to one of the means of proof." *M'Caskill* v. *Elliot*, 36 S.C.L. (5 STROBH) 196, 198 (1850).

[12] As the Court of Appeals noted, while a district court's findings of fact may be set aside only when clearly erroneous, ultimate findings of fact and conclusions of law are subject to *de novo* review. (P.A. 3a.)

allowing local governments their first constitutional violation with impunity.

It is petitioner's position that the rule adopted by the Court of Appeals is supported by neither precedents set by this Court nor reasoned decisions of the other Circuit Courts of Appeals. In addition, both the legislative history behind 42 U.S.C. § 1983 and the common law in effect at the time that the Civil Rights Act of 1871 was adopted indicate that such a rule as that relied upon by the Sixth Circuit is not consistent with the purposes and goals of the statute. The Sixth Circuit's rule denigrates the remedial purposes of § 1983 and vitiates the deterrent effects that the statute was meant to have.

This Court held in *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978), that units of local government not entitled to Eleventh Amendment immunity (including counties) may be held liable under § 1983 where the unconstitutional action "implements or executes a policy statement, ordinance, regulation, *or decision* officially adopted and promulgated by that body's officers." 437 U.S. at 690 (emphasis supplied). When a constitutional deprivation is caused by a policy or custom made by a local government's "lawmakers or by those whose edicts or acts may fairly be said to represent official policy" the governmental entity may thus be responsible under § 1983. *Monell, supra*, 436 U.S. at 694.

In the matter *sub judice*, the courts below recognized that petitioner, Dr. Bertold Pembaur, suffered a constitutional deprivation (an illegal axing of the door to and search of his private medical center in violation of the Fourth and Fourteenth Amendments) that was authorized and directed by an elected county official. Hamilton County, Ohio, should not be permitted to avoid liability simply because no forcible illegal search had been specifically ordered by any elected county official prior to the one giving rise to this case.

In conclusion, it is respectfully requested that the judgment of the Sixth Circuit Court of Appeals affirming the trial court's judgment on behalf of Hamilton County, Ohio, be reversed and the matter be remanded for a determination of damages.

ARGUMENT

A single, discrete decision of an elected county prosecutor which directly causes an unconstitutional search of a private medical office may fairly be said to represent official policy so as to render a county liable under 42 U.S.C. § 1983.

It is the petitioner's position that county policy was the "moving force" that caused Dr. Pembaur to be deprived of his constitutional right to be secure from unreasonable searches and seizures. It was not until the county prosecutor personally directed the deputy sheriffs to "go in and get them" that the door to the private working areas of the medical center was axed down and a search conducted. Clearly, the facts set forth in the record establish that the county itself should be liable for the constitutional deprivation suffered by Dr. Pembaur.

1. No decision of this Court has ever suggested that local governments are entitled to avoid liability for the first occurrence of a constitutional violation authorized and directed by a policymaking official.

The decisions of this Court have never denied relief to the first victim of a constitutional violation simply because the victim was the first to suffer a constitutional deprivation caused by an elected official's decision. Rather, the opinions of this Court support petitioner's claim for relief.

In *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978), this Court held that units of local government are "persons" within the meaning of § 1983.

> "Congress *did* intend municipalities and other local government units to be included among those persons to whom § 1983 applies. Local governing bodies, therefore, can be sued directly under § 1983 for monetary, declaratory, or injunctive relief where, as here, the ac-

> tion that is alleged to be unconstitutional implements or executes a policy statement, ordinance, regulation, *or decision* officially adopted and promulgated by that body's officers." 437 U.S. at 690 (emphasis supplied, footnotes omitted).

This Court concluded:

> "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under § 1983." 436 U.S. at 694.

The "touchstone" of governmental liability is thus where official policy, be it a "policy statement, ordinance, regulation or decision," is the "moving force" of the constitutional violation. *Monell*, 436 U.S. at 690-694;[13] *Polk County* v. *Dodson*, 454 U.S. 312, 326 (1981). See also *Rizzo* v. *Goode*, 423 U.S. 362, 371 (1976), requiring an "affirmative link" between the misconduct and the government's approval or authorization of that misconduct.[14]

Thus, under this Court's reasoning and language in *Monell* alone, the edict[15] of the county prosecutor to "go in and get

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[13] Justice Powell, in his concurring opinion in *Monell*, also recognized that Congress intended units of local government, not just public officials, to be liable for constitutional injuries resulting from actions by officials "acting under the command or the specific authorization of the government employer. . . ." 436 U.S. at 707.

[14] There, the District Court had in fact found that "the responsible authorities had played no affirmative part in depriving any members of the two respondent classes of any constitutional rights." 423 U.S. at 377. This Court's decision in *Rizzo* suggests, however, that the actual exercise of the right to control or direct, rather than the failure to exercise that power, is sufficient to support a § 1983 claim against a government entity. See *Monell*, 437 U.S. at 694 fn. 58.

[15] The term "edict" has been defined as "an official public proclamation or order issued by authority" and is synonymous with "decree," "order," and "command." See Webster's New Twentieth Century Dictionary, Unabridged Second Edition.

them" constitutes official policy for which the county should be held liable.[16] However, *Monell* was not intended to address the "full contours" of the governmental liability question. 436 U.S. at 695. This Court went a step further in defining the nature and scope of government liability under § 1983 in *Owen* v. *City of Independence*, 445 U.S. 622 (1980). A unit of local government not only is a "person" amenable to suit under § 1983, but it was held in *Owen* to enjoy no immunity from liability. 445 U.S. at 657.

While the *Owen* Court did not directly address the issue as to whether a single decision of a policymaker constitutes official policy so as to render the governmental entity liable, the facts of that case clearly answer the question. There, the chief of police was terminated by the city manager, without being afforded due process, at the same time as city council approved the release to the media of certain investigative reports pertaining to the police department.

Clearly, *Owen* involved a single incident, a wrongful termination, for which the municipality was held liable. There was never any suggestion that there was, or needed to be, a showing that the city had a past practice of terminating employees without due process. There is no doubt that *Owen* contemplated the possibility of a local government being held liable for a constitutional violation caused by a "decision" of an elected official since the Court reasoned that a decision maker should consider the impact of his action on the public fisc. *Owen*, 445 U.S. at 656.[17]

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[16] Governmental liability may be based upon legislative, executive, or judicial action. *Mitchum* v. *Foster*, 407 U.S. 225, 240 (1972). Thus, in *Lombard* v. *Louisiana*, 373 U.S. 267, 273 (1963), this Court equated the "official command" of a government official to a municipal ordinance. The Sixth Circuit has refused to acknowledge this equation.

[17] This same rationale appears in *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247 (1981), where this Court refused to permit punitive damage awards against municipalities. That case, like *Owen*, involved a single decision by policymakers (to cancel a contract). One reason for rejecting the award of punitive damages against cities was that it was unclear that such an award would deter a policymaker from committing recurrent constitutional violations. 453 U.S. at 269-270.

Finally, this Court's recent pronouncement in *City of Oklahoma City* v. *Tuttle*, ____ U.S. ____, 105 S.Ct. 2427, 85 L.Ed.2d 791 (1985), indicates that there is no justification for the Sixth Circuit's "first bite" rule. In *Tuttle* a jury instruction permitted the inference of an official policy of inadequate training or deliberate indifference from an isolated incident of excessive use of force by a police officer.

As the Court aptly noted.

> "the inference allows a § 1983 plaintiff to establish municipal liability without submitting proof of a single action taken by a municipal policymaker." 105 S.Ct. at 2435, 85 L.Ed.2d at 803.

Based upon *Monell*, such a nebulous link between municipal policy and unlawful conduct was properly rejected. However, this Court suggested that proof of a single incident of unconstitutional activity would be sufficient to impose § 1983 liability on a unit of local government when it is shown that "it was caused by an existing, unconstitutional municipal policy, which policy can be attributed to a municipal policymaker." 105 S.Ct. at 2436, 85 L.Ed.2d at 804. Official policy may thus be found where a policymaking official has consciously chosen a course of action from among various alternatives to guide present as well as future decisions. 105 S.Ct. at 2436, 85 L.Ed.2d at 804 and fn. 6.

In the case at hand, the county prosecutor was advised of the situation and chose to order a forcible entry. He did not choose, for example, to obtain a search warrant (as the doctor suggested), to wait until the end of the employees' workday, or any alternative method of executing the capiases, particularly where there was obviously no exigent circumstances demanding immediate action. There can be no denying the "causal relation" or "affirmative link" here between the prosecutor's instructions to the deputies to "go in and get them" and the constitutional violation, the patently illegal search of private medical offices. *Tuttle*, 105 S.Ct. at 2436, 85 L.Ed.2d at 803-804; *Rizzo* v. *Goode*, 423 U.S. 362, 371 (1976).

The concurring opinion in *Tuttle*, which characterized as

an "unlikely or extravagant premise" the argument that a unit of local government is entitled to be protected from liability for its first constitutional violation, also supports petitioner's position here.

> "Respondent objects that in *Monell* and *Owen* v. *City of Independence*, 445 U.S. 622 (1980), we found a municipality liable despite evidence that showed only a single instance of misconduct. If the city's argument here depended on the premise that municipal conduct that resulted in only a single incident was immune from liability, I would have to agree with respondent that *Monell* and *Owen* provide authority to the contrary. A rule that the city should be entitled to its first constitutional violation without incurring liability — even where the first incident was the taking of the life of an innocent citizen — would be a legal anomaly, unsupported by the legislative history or policies underlying § 1983. A § 1983 cause of action is as available for the first victim of a policy or custom that would foreseeably and avoidably cause an individual to be subjected to deprivation of a constitutional right as it is for the second and subsequent victims; by exposing a municipal defendant to liability on the occurrence of the first incident, it is hoped that future incidents will not occur. 105 S.Ct. at 2440-2441, 85 L.Ed.2d at 809-810 (Brennan, J., concurring).

The Sixth Circuit's ruling in this case is clearly incorrect and the holding of the Court of Appeals must be reversed. As has been shown above, this Court has never approved or condoned a rule requiring repeated decisions or multiple incidents directed by policymakers before governmental liability could attach.

2. Nothing in the legislative history for the Civil Rights Act of 1871 suggests that the Act was not intended to provide a remedy to the first victim of a constitutional violation caused by a governmental entity.

In *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978), this Court overruled *Monroe* v. *Pape*, 365 U.S. 167 (1961),[18] and held that municipalities and other units of local government not entitled to Eleventh Amendment immunity are "persons" who may be held liable under § 1983. This holding was based upon an exhaustive analysis of the legislative history of the Civil Rights Act of 1871[19] and the proposed Sherman Amendment. *Monell*, 436 U.S. at 665-689. While the legislative debate on § 1 of the Civil Rights Act of 1871, the predecessor to 42 U.S.C. § 1983, is relatively limited, it is quite clear that the provision was intended to be remedial in nature and thus to be interpreted as broadly as possible to give a remedy for violations of federally protected rights. See *Monell*, 436 U.S. at 684-685.

Representative Shellabarger of Ohio, for example, declared in the course of the debates that:

> "This act is remedial, and in aid of the preservation of human liberty and human rights. All statutes and constitutional provisions authorizing such statutes are liberally and beneficently construed. It would be most strange and, in civilized law, monstrous were this not the rule of interpretation. As has been again and again

[18] In *Monroe*, this Court held that municipalities did not fall within the ambit of § 1983. 365 U.S. at 187. The Court did hold, however, that the allegations of an unreasonable search, seizure and arrest by Chicago police officers stated a claim under § 1983 against the other defendants. Quoting *United States* v. *Classic*, 313 U.S. 299, 326 (1941), this Court recognized that "Misuse of power, possessed by virtue of state law and made possible only because the wrongdoer is clothed with the authority of state law is action taken 'under color of' of state law." 365 U.S. at 184.

[19] Act of April 20, 1871, Ch. 22, § 1, 17 Stat. 13 (1871).

> decided by your own Supreme Court of the United States, and everywhere else where there is wise judicial interpretation, the largest latitude consistent with the words employed is uniformly given in construing such statutes and constitutional provisions as are meant to protect and defend and give remedies for their wrongs to all the people. These provisions of the fourteenth amendment are wholly devoted to securing the equality and safety of all the people, as is this section, and, indeed, the entire bill. In deciding whether the section or the bill is warranted by this fourteenth amendment, ought not the fact that it is so eminently just and fair, so eminently in accordance with the spirit of our institutions, so wholly devoted to the single and sublime work of preserving the rights and liberties and government of all the people, and which gives not a power, except such as is, by the language employed, carefully confined and consecrated to the sacred duty of protecting the people and their Government, to have mighty weight in determining the question of the power to make it? Chief Justice Jay and also Story say:
>
> > 'Where power is remedial in its nature there is much reason to contend that it ought to be construed liberally, and it is generally adopted in the interpretation of laws.' 1 Story on Constitution, sec. 429"
>
> CONG. GLOBE, 42d Cong. 1st SESS. APP. 68 (1971) (Hereinafter "Globe App.")

Representative Shellabarger compared § 1 to the criminal proceedings under the Act and noted that § 1 applies not only to former slaves, "but also to all people where, under color of State law, they or any of them may be deprived of rights to which they are entitled under the Constitution by reason and virtue of their national citizenship." Globe App. 68.

Similarly, Representative Bingham of Ohio reasoned that Congress has the power to legislate

> "to provide by law for the enforcement of the Constitution, on behalf of the whole people, the nation, and for the enforcement as well of the Constitution on behalf of every individual citizen of the Republic in every State and Territory of the Union to the extent of the rights guaranteed to him by the Constitution." Globe App. 81.

Finally, even Senator Thurman of Ohio, in opposing the adoption of § 1 because it transferred cases into the Federal courts, stated:

> "I am certainly not in favor of denying to any man who is deprived unlawfully of his right, his privilege, or his immunity, under the Constitution of the United States, that redress to which every man is entitled whose rights are violated. . . ." Globe App. 216.

Clearly, nothing in the legislative history of the Civil Rights Act suggests that the Act was not intended to remedy the first constitutional violation committed by a governmental entity. The rule adopted by the Sixth Circuit in fact defeats the Congressional intent to provide a remedy for *all* people deprived of their constitutional rights.

3. The common law in effect at the time section 1 of the Civil Rights Act of 1871 was adopted recognized governmental liability for single incidents of misconduct directed by officials having authority to act by virtue of their offices.

The common law in effect at the time the Civil Rights Act of 1871 was adopted also recognized governmental liability for single incidents of misconduct authorized or directed by proper officials of local governments. In *Thayer* v. *Boston*, 36 Mass. 511 (1837), relied upon in *Owen* v. *City of Independence*, 445 U.S. 622, 641 (1980), an action for damages was brought against the City of Boston for injuries caused as a result of a single action by officials having authority to act by virtue of their offices. 36 Mass. at 514. The court stated:

> "There is a large class of cases, in which the rights of both the public and of individuals may be deeply involved, in which it cannot be known at the time the act is done, whether it is lawful or not. The event of a legal inquiry, in a court of justice, may show that it was unlawful. Still, if it was not known and understood to be unlawful at the time, *if it was an act done by the officers having competent authority, either by express vote of the city government, or by the nature of the duties and functions with which they are charged, by their offices, to act upon the general subject matter*, and especially if the act was done with an honest view to obtain for the public some lawful benefit or advantage, reason and justice obviously require that the city, in its corporate capacity, should be liable to make good the damage sustained by an individual, in consequence of the acts thus done. 36 Mass. at 515 (emphasis supplied).

The Supreme Judicial Court of Massachusetts adopted the rule that a municipality will be liable for an act causing injury

> "provided such act is done by the authority and order of the city government, or of those branches of the city government, invested with jurisdiction to act for the corporation, upon the subject to which the particular act relates, or where after the act has been done, it has been ratified, by the corporation, by any similar act of its officers." *Thayer* v. *Boston*, 36 Mass. at 516.

This rule was adopted, creating municipal liability, because otherwise

> "all agents, officers and subordinate persons, might well refuse to act under the directions of its government in all cases. . . ." *Thayer* v. *Boston*, 36 Mass. at 516.

The case was remanded for a determination as to whether the particular injurious act had been authorized by the city. 36 Mass. at 516-517.

Similarly, in *Goodloe* v. *City of Cincinnati*, 4 Ohio 500, 514 (1831), the court recognized that a municipality may be held liable for a single injurious incident committed by a city agent acting in good faith "according to the directions of his employers." See also *Smith* v. *City of Cincinnati*, 4 Ohio 514 (1831); *Rhodes* v. *City of Cleveland*, 10 Ohio 160 (1840). Finally, in *Town Council of Akron* v. *McComb*, 18 Ohio 229, 230-231 (1849), relying on *Rhodes* v. *City of Cleveland*, and *Thayer* v. *Boston*, the court held that a town may be found liable for an injurious act committed "under an authorized order of the town."[20]

Thus, historically, there is no doubt that local governments were liable for injurious acts authorized or directed by an official "invested with jurisdiction to act for the corporation." *Thayer* v. *Boston*, 36 Mass. at 516.

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[20] This proposition also finds support in the leading treatises concerning municipal law.

> "A municipal corporation is liable to the same extent as an individual for any act done by the express authority of the corporation, or of a branch of its government, empowered to act for it upon the subject to which the particular act relates, and for any act which, after it has been done, has been lawfully ratified by the corporation." T. Shearman & A. Redfield, A Treatise on the law of Negligence § 120, p. 139 (1869).

See also, 4 DILLON, MUNICIPAL CORPORATIONS § 1651, p. 2874 (5th Ed. 1911), (municipal corporation liable for injuries and trespasses committed by officials "under its authority or direction").

4. Federal Courts have consistently found that a single, discrete decision by a policymaking official constitutes the official policy of the governmental entity.

It is not surprising that other Circuit Courts that have addressed the question have concluded that a single decision by a policymaking official directed at a single individual and causing a deprivation of a constitutional right may form the basis for governmental liability under § 1983. This Court's precedents, as well as the legislative history and common law in effect at the time the Civil Rights Act of 1871 was adopted, simply do not support denial of a remedy to the first victim of a constitutional violation. Federal Courts have almost uniformly rejected the proposition relied upon by the Sixth Circuit to affirm the trial court's judgment in favor of the county. Where governmental liability is based not on the inference of official policy from a single incident of misconduct by a low-level employee but arises from a specific decision by a policymaker, every court that has addressed the issue, save one, has found that the governmental entity may be held liable under § 1983.

Perhaps the earliest discussion of this issue appears in *Smith* v. *Ambrogio*, 456 F.Supp. 1130 (D. Conn. 1978). There, the court noted that

> "it seems reasonable to conclude that its [*Monell's*] teachings are equally applicable to a specific policy directed at just one individual, as long as the pleaded facts support the inference that unconstitutional action was taken against the individual pursuant to such a policy." 456 F.Supp. at 1134 fn. 3.

Relying upon this language, the court in *Himmelbrand* v. *Harrison*, 484 F.Supp. 803, 810 (W.D. Va. 1980), concluded that "discrete" acts of governmental officials may constitute official policy if the conduct of the single official represents the official position of the governmental unit.

In *Van Ooteghem* v. *Gray*, 628 F.2d 488 (5th Cir. 1980),

a government employee was fired from his employment by an elected county treasurer because of the plaintiff's attempts to exercise his First Amendment rights. The court, upon recognizing that a county may be held liable under § 1983 for the decisions of an elected county official, 628 F.2d at 494-495, held that since Gray, as an elected county official, had "complete authority" for his action in firing plaintiff, "when he so acted, he acted for Harris County; when he so erred, he erred for the County." 628 F.2d at 495. Thus, a single, discrete decision by Gray, an elected county official, causing a constitutional deprivation, formed the basis for county liability under § 1983.

Similarly, in *Familias Unidas* v. *Briscoe*, 619 F.2d 391, 404 (5th Cir. 1980), the court held that as to an elected official,

> "at least in those areas in which he, alone, is the final authority or ultimate repository of county power, his official conduct *and decisions* must necessarily be considered those of one 'whose edicts or acts may fairly be said to represent official policy' for which the county may be held responsible under section 1983. . . ." (emphasis supplied, citations omitted)

See also *Bowen* v. *Watkins*, 669 F.2d 979, 989-90 (5th Cir. 1982), holding that where an official "has final authority in a matter involving the selection of goals or of means of achieving goals, his choices represent governmental policy. . . ." (citations omitted)

The Fifth Circuit echoed this conclusion in *Languirand* v. *Hayden*, 717 F.2d 220 (5th Cir. 1983), and again in *Bennett* v. *City of Slidell*, 728 F.2d 762 (5th Cir. 1984). The *Languirand* court stated:

> "We also observed that it is well settled that a municipality may be liable under section 1983 for the intentional conduct of its governing body, even though such conduct is an *ad hoc*, isolated, individual action not

> taken pursuant to any overall municipal custom or policy . . . This is also true regarding deprivations directly caused by the intentional actions of individual officials respecting a subject matter where they have the legal 'final authority,' and are the 'ultimate repository of . . . power,' of the governmental unit in question." 717 F.2d at 227 (citations omitted)

In *Bennett*, the court recognized that where a city council violates a person's rights "by direct orders or by setting a course of action" the entity may be liable. 728 F.2d at 767. This principle was specifically stated to apply to officers of county government who are elected and thus derive policymaking authority from the electorate. 728 F.2d at 765 fn. 1.

The Second Circuit has also recognized that a single incident directed by a high-ranking official causing a constitutional violation may result in governmental liability. *Quinn* v. *Syracuse Model Neighborhood Corp.*, 613 F.2d 438 (2d Cir. 1980). There, an employee was discharged as a scapegoat to cover a scandal over missing funds. The court held that where a policymaking official, a mayor, directs a campaign of harassment against someone in derogation of his constitutional rights, the municipality may be liable under § 1983. 613 F.2d at 448.

More recently, the Second Circuit specifically held, in a case involving the firing of a municipal employee, that

> "[a] single unlawful discharge, if ordered by a person 'whose edicts or acts may fairly be said to represent official policy,' *Monell*, 436 U.S. at 694, 98 S.Ct. at 2037, may support an action against the municipal corporation." *Rookard* v. *Health and Hospitals Corp.*, 710 F.2d 41, 45 (2d Cir. 1983).

For the *Rookard* court, the difficulty lay in identifying which officials are policymakers whose actions may be treated as those of the unit of local government, not in finding

the existence *vel non* of such an official policy. 710 F.2d at 45.[21]

The Seventh Circuit, in *Reed* v. *Village of Shorewood*, 704 F. 2d 943, 953 (7th Cir. 1983), recognized that a municipality could be held liable under § 1983 for acts of a policymaking official even where the official enjoys absolute immunity. Relying on *Reed*, the district court in *DeLaCruz* v. *Pruitt*, 590 F.Supp. 1296, 1306-1307 (N.D. Ind. 1984), found the county liable for a constitutional deprivation caused by a single act of termination by the county auditor.

Similarly, the Eighth Circuit in *Sanders* v. *St. Louis County*, 724 F.2d 665, 668 (8th Cir. 1983), noted:

> "It may be that one act of a senior county official is enough to establish the liability of the county, if that offical was in a position to establish policy and if that official himself directly violated another's constitutional rights. . . ." (citations omitted)

Finally, both the Ninth Circuit in *McKinley* v. *City of Eloy*, 705 F.2d 1110, 1116-1117 (9th Cir. 1983), and the Eleventh Circuit in *Berdin* v. *Duggan*, 701 F.2d 909, 914 (11th Cir. 1983), have also held that where a senior government official (a mayor and a city manager, respectively) unconstitutionally discharges a municipal employee, the official's single action constitutes the official policy of the city.

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[21] As noted above, there is no dispute here that the county prosecutor, an elected official, is a policymaker for the county. See Decision of Court of Appeals, P.A. 7a fn.3. The county defendants never argued that the sheriff and prosecutor are not policymaking officials. Rather, citing *Turpin* v. *Mailet*, 619 F.2d 196 (2d Cir. 1980), the county defendants argued the position adopted by the Court of Appeals that

> "A single, isolated instance of illegality does not constitute a custom or policy on which liability can be imposed." Brief of Defendants/Appellees Hamilton County, et al. at 7.

Turpin involved an attempt to hold a municipality liable for inadequate supervision and training based upon a single incident of misconduct by a police officer. There was no evidence in *Turpin* that a policymaking official personally directed the unconstitutional conduct. 619 F.2d at 202.

Only the Third Circuit, in *Losch* v. *Borough of Parkersburg*, 736 F.2d 903 (3rd Cir. 1984), has suggested otherwise. There, a police chief and two of his officers signed a criminal complaint, allegedly to harass plaintiff. In rejecting plaintiff's § 1983 action alleging malicious prosecution, the court questioned whether the police chief was a "final authority" with respect to these activities and whether the action in filing a complaint was sufficient to constitute official policy. Citing *Walters* v. *City of Ocean Springs*, 626 F.2d 1317, 1323 (5th Cir. 1980) and *Turpin* v. *Mailet*, 619 F.2d 196, 202 (2d Cir. 1980), *cert. denied*, 449 U.S. 1016 (1982), each involving an attempt to infer official policy from a single incident of wrongdoing by a police officer, the court stated that "[a] policy cannot ordinarily be inferred from a single instance of illegality such as a first arrest without probable cause." 736 F.2d at 911. It is not clear how that court would rule where, as in the matter *sub judice*, a policymaking official, acting within his official capacity, personally directs and authorizes a specific constitutional violation.

In sum, virtually every court that has confronted the issue *sub judice*, other than the Sixth Circuit, has explicitly or at least tacitly recognized that a single, discrete decision by a policymaking official that directly causes a person to be deprived of constitutional rights represents official policy so as to render the unit of local government liable under § 1983.

5. The Sixth Circuit's rule immunizing the county from liability for the first constitutional violation authorized and directed by a policymaking official is against public policy and eviscerates the legislative goals of 42 U.S.C. § 1983.

It has often been recognized that § 1983 serves a dual purpose, compensation for redress of constitutional deprivations and deterrence. See, e.g. *Monroe* v. *Pape*, 365 U.S. 167, 172-187 (1961); *Mitchum* v. *Foster*, 407 U.S. 225, 238-242 (1972); *Carey* v. *Piphus*, 435 U.S. 247, 254 (1978); *Robertson* v. *Wegmann*, 436 U.S. 584, 590-591 (1978); *Owen* v. *City of*

Independence, 445 U.S. 622, 651 (1980); *Carlson* v. *Green*, 446 U.S. 14, 21 (1980); and *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 268-269 (1981).

As discussed above, the remedial purpose of the Civil Rights Act is evident from the Congressional debates. Representative Shellabarger stressed that § 1 of the Act should be broadly construed to effectuate its remedial nature. Globe App. 68. This Court recognized in *Owen* that it would be "uniquely amiss" if the governmental entity could avoid § 1983 liability since

> "[a] damages remedy against the offending party is a vital component of any scheme for vindicating cherished constitutional guarantees. . . ." 445 U.S. at 651.

Victims of constitutional wrongs would be left without remedy, in light of the immunities available to government officials, if the governmental entity is permitted to avoid liability caused by its policymaking officials. *Owen*, 445 U.S. at 651. In the matter *sub judice*, the lower courts held that the individual officials were entitled to qualified immunity.[22] By insulating the county itself from liability simply because this was the first occasion on which the policymaker had authorized and directed the unconstitutional conduct, Dr. Pembaur was denied a remedy for his constitutional deprivation. This is particularly ironic here where the Ohio Supreme Court held that Dr. Pembaur should not have exercised his Fourth and Fourteenth Amendment rights by refusing entry (in the absence of bad faith and unreasonable conduct on the

[22] Although the elected county prosecutor was not a named defendant, an assistant prosecuting attorney, defendant Whalen, was held to enjoy qualified immunity. (P.A. 21a-23a, 4a-5a.) Presumably, the prosecutor himself would have been found to enjoy that same qualified immunity, if not absolute immunity, pursuant to *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). That the official might be entitled to immunity, qualified or absolute, of course does not insulate the governmental entity itself. See *Owen*, 445 U.S. at 657; *Lake Country Estates, Inc.* v. *Tahoe Regional Planning Agency*, 440 U.S. 391, 405, n. 29 (1979).

part of the law enforcement officers), but rather should have sought redress in the courts. *State* v. *Pembaur*, 9 Ohio St.3d 136, 138, 459 N.E.2d 217 (1984), *cert. denied*, ____ U.S. ____, 104 S.Ct. 2668, 81 L.Ed.2d 373 (1984).

The Sixth Circuit in this case has effectively created a form of governmental immunity for constitutional wrongs, even those ordered by policymaking officials, except in cases of recurrent violations. This is in spite of the total lack of legal or historical support for its new rule. The court has thus recreated the governmental immunity that this Court laid to rest in *Owen*. The result is the undermining of the remedial purposes of § 1983.

Section 1983 was intended "to serve as a deterrent against future constitutional deprivations as well . . . ." *Owen*, 445 U.S. at 651 (citations omitted). A policymaker should be required to consider, in choosing a course of action, the constitutional implications of his decisions.

> "[C]onsideration of the *municipality's* liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if, at some point, he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury." *Owen*, 445 U.S. at 656 (emphasis in original).

The Sixth Circuit's rule protecting a unit of local government from liability for its first constitutional wrong in a given area also defeats this deterrent purpose for § 1983. A government official is personally immune under § 1983 for his actions unless the constitutional rights at stake were clearly established at the time, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818-819 (1982) (enunciating the standard for qualified immunity), or the nature of the office imposes an absolute immunity. *Imbler* v. *Pachtman*, 424 U.S. 409 (1976). The official certainly would not be liable for punitive damages ab-

sent "recurrent constitutional violations by reason of his office." *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. at 269-270. Therefore, if a policymaking official is permitted to make his first decision in a given area without concern of liability on either his part or that of the governmental entity there would be no incentive to consider or respect the constitutional rights of citizens.

The Sixth Circuit's rule clearly permits, if not encourages, officials to ignore the constitutional rights of the public. Yet § 1983 was adopted to protect the public's constitutional rights from just such official callousness. As this court recognized in *Owen*,

> "The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights." *Owen* v. *City of Independence*, *supra*, 445 U.S. at 651-652

The Sixth Circuit has removed this incentive for government officials to respect the rights of citizens. Both the remedial and the deterrent goals of 42 U.S.C. § 1983 are emasculated when a unit of local government is not held responsible for a decision by a policymaking official which directly causes a person to be deprived of his constitutional rights. The Sixth Circuit rule is absolutely at odds with the public policies underlying the Civil Rights Act.

CONCLUSION

There is simply no support, legal or historical, for the Sixth Circuit's ruling. Public policy likewise militates against this new form of government immunity. A single, discrete decision of an elected county prosecutor which directly causes an unconstitutional search of a private medical office may fairly be said to represent official policy so at to render a county liable under 42 U.S.C. § 1983.

The judgment of the Court of Appeals with respect to the liability of Hamilton County, Ohio, should be reversed and the matter should be remanded for a determination of damages.

Respectfully submitted,

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No. 84-1160

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1985

BERTOLD J. PEMBAUR, M.D.,
Petitioner,

vs.

CITY OF CINCINNATI, OHIO, HAMILTON COUNTY, OHIO, HON. NORMAN A. MURDOCK, HON. JOSEPH M. DeCOURCY, JR., AND HON. ROBERT A. TAFT, II,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

---

BRIEF OF RESPONDENTS

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QUESTON PRESENTED FOR REVIEW

CAN THE SINGLE, DISCRETE STATEMENT OF A COUNTY PROSECUTOR IN GIVING ADVICE TO A DEPUTY SHERIFF CONSTITUTE THE IMPLEMENTATION OF A COUNTY POLICY SO AS TO RENDER A COUNTY LIABLE UNDER 42 U.S.C., Sec. 1983?

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No. 84-1160

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BRIEF OF RESPONDENTS

OPINIONS BELOW

The opinion of the Court of Appeals, filed October 18, 1984, is reproduced in Appendix A to the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit. That decision also appears at 746 F. 2d 337 (6th Cir. 1984).

The Findings of Fact, Opinions and Conclusions of Law of the United States District Court, filed on April 5, 1983, is reproduced in Appendix B to the Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit.

JURISDICTION

The Judgment of the Court of Appeals was entered on October 18, 1984. The Petition for Writ of Certiorari was filed in the Supreme Court of the United States on January 15, 1985. The Petition for Writ of Certiorari was granted on June 17, 1985. The jurisdiction of this Court is founded upon 28 U.S.C., Sec. 1254 (1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

CONSTITUTION OF THE UNITED STATES

FOURTH AMENDMENT

The right of the people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT

Section 1. Citizens of the United States

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

42 U.S.C. Sec. 1983. Civil Action for Deprivation of Rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the

District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia. (As amended December 29, 1979, P.L. 96-170, Sec. 1, 93 State. 1284.)

STATEMENT OF THE CASE

In April, 1977, the Grand Jury in Hamilton County, Ohio, began an investigation of the petitioner, Bertold J. Pembaur, M.D., involving the Rockdale Medical Center. During the investigation two employees of Dr. Pembaur, Marjorie McKinley and Kevin Maldon, were directed to appear before the Grand Jury, but they failed to appear. Subsequent to their failure to appear, two separate judges of the Court of Common Pleas of Hamilton County, Ohio, issued *capiases* for the arrest and detention of each witness. A *capias* was issued by Judge Robert S. Kraft on April 29, 1977 for Kevin Maldon and a *capias* was issed by Judge Robert H. Gorman on May 19, 1977, for Marjorie McKinley. (Joint Ex. II and III, Joint Appendix, J.A. 20-22)

On May 19, 1977, at approximately 2:00 p.m., Hamilton County Deputy Sheriffs Frank Webb and David Allen attempted to serve the *capiases* on Marjorie McKinley and Kevin Maldon at the Rockdale Medical Center, their usual place of employment. (R. 49, 138). The two Deputy Sheriffs showed their identification but were denied admittance by Dr. Pembaur who not only closed the door, but also barricaded the door with a piece of wood. (R. 51).

Dr. Pembaur called the Cincinnati Police Department and the news media to his office. After discussions with the County Sheriff's office and the County Prosecutor's Office, the Deputy Sheriffs attempted to force the door but they were unsuccessful.

Certain Cincinnati Police Officers arrived on the scene and sought advice from their supervisors as to what they were supposed to do. (Pl. Ex. 38, J.A. p. 24) A Cincinnati Police Officer then took an axe and chopped a hole in the door (R. 54) Neither Marjorie McKinley nor Kevin Maldon were found although Marjorie McKinley was hiding on the premises and Kevin Maldon was probably on the premises. (Stipulation, J.A. p. 34-35) At no time did the County Prosecutor appear at the scene of the indicent described above. No evidence was presented that there had ever been another occasion when a search had been conducted of a business office in an attempt to execute a *capias* for the arrest of two employees of the business owner.

The petitioner commenced an action pursuant to 42 U.S.C. Sec. 1983 and on other grounds on April 20, 1981, in the Southern District of Ohio, Western Division. The trial was conducted to the Court which ruled in favor of all defendants and dismissed petitioner's complaint. The Prosecuting Attorney was not named in the complaint, nor were there any allegations raised as to him.

The Sixth Circuit Court of Appeals affirmed the Trial Court's Decision as to Hamilton County, Ohio, but reversed as to the City of Cincinnati. The Sixth Circuit Court held that the petitioner had suffered no constitutional deprivation at the hands of Hamilton County. The petitioner failed to prove that he had suffered any constitutional deprivation pursuant to any policy, custom or practice in Hamilton County, Ohio. The Sixth Circuit Court of Appeals specifically found that the one entry into petitioner's business office to execute a *capias* for the arrest of two of petitioner's employees did not constitute an implementation of a governmental policy causing a constitutional deprivation.

SUMMARY OF ARGUMENT

From the respondents' viewpoint this case presents the question of whether a single, discrete rendering of advice by a County Prosecuting Attorney to a Deputy Sheriff in executing a *capias* is the implementation of a county policy so as to render a county liable under 42 U.S.C., Sec. 1983, for an unconstitutional search of a petitioner's business premises. The Sixth Circuit Court of Appeals, in affirming the judgment of the Trial Court as to Hamilton County, Ohio, clearly held that with regard to the one occasion on which there was a forcible entry to the petitioner's office, that neither the Prosecuting Attorney nor the Sheriff were implementing any governmental policy. Therefore, liability on the part of the County did not exist. *Pembaur* v. *City of Cincinnati*, 746 F. 2d 337, 341 (6th Cir. 1984).

Respondents believe that the petitioner's argument fails on several counts. First, and foremost, the petitioner has failed to show an unconstitutional policy on the part of Hamilton County, which was clearly established in May, 1977, when the search took place. That a search of the petitioner's premises took place without a search warrant cannot be denied. The petitioner, however, fails to show that the search was a implementation of a policy of Hamilton County. It is respondents' position that the rendering of legal advice by the County Prosecuting Attorney to either the Sheriff or the Deputy Sheriff does not constitute the implementation of a governmental policy required to impose liability within the dictates of *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978).

Further, it is the respondents' position that the petitioner must show that there was more than one single forcible entry into a business premises without a search warrant to constitute an unconstitutional policy. One, single, discrete action of a county employee, even when based upon the advice of a County policy maker, is not sufficient to rise to the level to the implementation of a county policy. This is especially true where the County Prosecuting Attorney has no authority to

direct the actions of the County Deputy Sheriffs, or City Police Officers. The sole role of the County Prosecuting Attorney in the present case was to render advice to the Sheriff's Department.

To embark on the road urged by the petitioner would essentially mean that the requirement of proving the existence of an unconstitutional policy whose implementation caused a constitutional deprivation had been eliminated. To accept the petitioner's argument would mean that proof of a constitutional deprivation in which a county employee had participated was enough to impose liability on the County.

ARGUMENT

THE SINGLE, DISCRETE STATEMENT OF A COUNTY PROSECUTOR IN GIVING ADVICE TO A DEPUTY SHERIFF DOES NOT CONSTITUTE THE IMPLEMENTATION OF A COUNTY POLICY SO AS TO RENDER A COUNTY LIABLE UNDER 42 U.S.C., SEC. 1983.

1. The petitioner must clearly show an existing unconstitutional policy that was the cause of the unconstitutional deprivation.

The direction and scope of the petitioner's entire argument focuses on a hearsay statement attributed to the County Prosecutor. The County Prosecutor's advice was sought by the County Sheriff in the execution of a *capias* for the arrest of two employees of the petitioner. The advice allegedly provided by the County Prosecutor has been elevated to the position of a County policy proclamation by which the petitioner is attempting to impose liability on Hamilton County, Ohio under 42 U.S.C. Sec. 1983.

The touchstone of petitioner's argument, of course, is *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658 (1978). This Court included local government units as persons capable of being sued under 42 U.S.C. Sec. 1983 and concluded by saying:

> ". . . that a local government may not be sued for an injury inflicted solely by its employees or agents. Instead, it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under Sec. 1983." 436 U.S. at 694.

Further, the policy statement or ordinance must be the "moving force" behind the constitutional violation. *Polk County* v. *Dodson*, 454 U.S. 312, 326 (1981).

This court has provided clarification of when liability may be imposed on a local goverment unit in the recent case of *City of Oklahoma City* v. *Tuttle*, ____ U.S. ____, 105 S. Ct. 2427 (1985). In *Tuttle* this Court recognized that, first of all, a policy can exist or be established in many ways. Liability should only occur when an unconstitutional policy exists. Secondly, this Court recognized that "some limitation must be placed on establishing municipal liability through policies that are not themselves unconstitutional," or the test set out in *Monell* will become a dead letter. *Tuttle, supra*, at 105 S. Ct. at 2436.

In the present action the petitioner has made the quantum leap to impose liability by concluding that because his office door was forced in an allegedly unconstitutional manner and because the County Prosecutor may have been involved in giving legal advice, then there must have been a county policy involved.

The petitioner has sidestepped the three-step approach that is suggested in *Bennett* v. *City of Slidell*, 728 F. 2d 762 (5th Cir. 1984), in determining when a local government unit would be liable for an unconstitutional act. In *Bennett* the Fifth Circuit stated that to impose liability on a city

> ". . . The complainant must identify the policy, connect the policy to the city itself and show that the particular injury was incurred because of the execution of that policy. 728 F. 2d at 767.

The petitioner blurs the distinction between the role of the Sheriff and the Prosecuting Attorney within Hamilton County, Ohio.[1] It is the Sheriff's responsibility to serve and execute a *capias* for the arrest of an individual. The Prosecuting Attorney may be requested to give legal advice but the Prosecuting Attorney has no duty with regard to the service of a *capias*. The Prosecuting Attorney may not direct or order the movement of the Sheriff or his deputies.

In the present action the Prosecuting Attorney did no more than give advice to the County Sheriff. The policy of the County Sheriff may have been to seek advice from the Prosecuting Attorney. The policy of the Prosecuting Attorney was

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[1] The duties of the County Sheriff are generally found in Chapter 311, Ohio Revised Code. Section 311.07, Ohio Revised Code, provides in pertinent part:

> "(A) Each sheriff shall preserve the public peace and cause all persons guilty of any breach of the peace, within his knowledge or view, to enter into recognizance with sureties to keep the peace and to appear at the succeeding term of the court of common pleas, and the Sheriff shall commit such persons to jail in case they refuse to do so. He shall return a transcript of all his proceedings with the recognizance so taken to such court and shall execute all warrants, writs, and other process directed to him by any proper and lawful authority."

The duties and responsibilities of the Prosecuting Attorney are generally found in Chapter 309, Ohio Revised Code. Section 309.09, Ohio Revised Code, provides in pertinent part:

> "(A) The prosecuting attorney shall be the legal adviser of the board of county commissioners, board of elections, and all other county officers and boards, including all tax supported public libraries, and any of them may require written opinions or instructions from him in matters connected with their official duties."

to give legal advice based upon the law as he knew it to exist.[2] The Prosecuting Attorney did not order any forcible entry or search and he had no authority to do so.

The seeking of legal advice and the granting of legal advice can hardly be considered an unconstitutional policy on the part of Hamilton County, Ohio.

To render a County liable itself for a constitutional deprivation caused by a county employee, there should be a clear showing of an unconstitutional policy causing the injury. *Polk County*, *supra*, 454 U.S. at 325; *City of Oklahoma City*, *supra*, 105 S. Ct. at 2436; *Wellington* v. *Daniels*, 717 F. 3d 932, 935 (4th Cir. 1983).

The petitioner has clearly failed to establish the crucial step of showing the alleged county policy that was unconstitutional. Absent an unconstitutional policy there can be no liability imposed on the county.

2. The showing of a single incident of a Prosecuting Attorney giving legal advice to the County Sheriff should not be sufficient to impose liability on the county.

The petitioner would have this Court adopt a rule that any single, discrete decision by a policy making official of the County is sufficient to cause the establishment and implementation of a governmental policy for which the county could be liable in an action under 42 U.S.C. Sec. 1983. This Court recently held in the case of *City of Oklahoma City* v. *Tuttle*, *supra*, at 105 S. Ct. 2436, that:

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[2] The Sixth Circuit recognized that at the time of the incident on May 19, 1977 the state of the law would have allowed a search of the premises absent a search warrant to execute an arrest warrant. *Pembaur* v. *City of Cincinnati*, 746 F. 2d 337, 339, 340 (6th Cir. 1984), citing *United States* v. *McKinney*, 379 F. 2d 259, 263 (6th Cir. 1967). This was the basis for granting qualified immunity to William Whalen in this case and which has not been challenged by the petitioner.

> "Proof of a single incident of unconstitutional activity is not sufficinet to impose liability under *Monell* unless proof of the incident includes proof that it was caused by an existing, unconsitutional municipal policy, which policy can be attributed to a municipal policy maker."

Contrary to the petitioner's belief, lower Federal Courts have not consistently found that a single, discrete decision by a policy making official constitutes the official policy of the governmental entity for which a local government could be liable. In *Losch* v. *Borough of Parkesberg*, 736 F. 2d 903 (3d Cir. 1984), there was a claim that the police chief had caused the arrest of a citizen without probable cause because the chief possessed final authority for determining arrest procedures and that an arrest at his direction would make the city liable. The Third Circuit Court of Appeals rejected this reasoning and held that the municipal policy, as that term is used in *Monell*, cannot be inferred from a single incident of illegality. 736 F. 2d at 903.

In the Fourth Circuit the Court in *Wellington* v. *Daniels*, *supra*, refused to hold a municipality liable for the inadequate training of officers by its police chief on the basis of a single incidence of police brutality. Even though the police chief was the final authority for training police, the link needed to tie the alleged unconstitutional policy with the unconstitutional act was missing when there was only one allegation of misconduct. Also see *Milligan* v. *City of Newport News*, 743 F. 2d 227 (4th Cir. 1984).

The Fifth Circuit Court of Appeals in *Bennett* v. *City of Slidell*, *supra*, refused to hold the City liable for the activities and misconduct of the City Attorney and a Building Inspector in unnecessarily delaying the issuance of permits to a particular business. This was so even though the City Attorney had the final discretionary authority in undertaking the action relevant in that case. Not every discretionary action taken by a policy making official renders the local government authority liable for that discretionary act. See also *Berry*

v. *McLemore*, 670 F. 2d 30 (5th Cir. 1982), in which the City was held not liable for the actions of the police chief using excessive force during an arrest, even though the police chief determined the arrest policy.

It is clear that there are many cases which support the Sixth Circuit's reasoning in this action in that the single, discrete advice given by the Prosecutor and the decision of the Deputy Sheriffs to force entry into the petitioner's office was not the implementation of a government policy. *Pembaur*, *supra*, 746 F. 2d at 341. A single, discrete decision does not a policy make.

The petitioner has done little more than to establish that on a particular occasion his door to his office was forced and a search of the business premises was conducted without a search warrant, even though an arrest warrant existed for two of petitioner's employees. There is no evidence that such an action had ever taken place before or that the Prosecuting Attorney's advice had ever been sought before or had ever been given before. The petitioner clearly cannot point to an existing unconstitutional policy on the part of Hamilton County in May, 1977 when the search of the business premises did not clearly become unconstitutional until this Court's decision in *Steagald* v. *United States*, 451 U.S. 204 (1981).

The petitioner has done little more than show that on one particular occasion the Prosecuting Attorney rendered advice to the Deputy Sheriff, giving his interpretation of the law with regard to the execution of arrest warrants at that particular time.

The single occurrence of the entry into the petitioner's office because of the interpretation of the advice of the Prosecuting Attorney by the Deputy Sheriffs should not be a type of occurrence which renders the County liable under 42 U.S.C. Sec. 1983.

3. To adopt the Petitioner's position would be tantamount to imposing liability on the County under a theory of respondeat superior.

This Court has consistently held that liability will not be imposed on a government unit under 42 U.S.C Sec. 1983 under a theory of *respondeat superior*. *Monell, supra*, at 436 U.S. 691; *Polk County, supra*, at 454 U.S. 325; *Owen* v. *City of Independence*, 445 U.S. 622, 655 (1980). To adopt the petitioner's argument, however, and impose liability upon the County, seems to clearly be a situation where liability would be imposed on the theory of *respondeat superior*.

In the present action the Prosecuting Attorney was not named as a defendant in the complaint. No allegations were raised against the Prosecuting Attorney in the complaint. No allegations were made against the Prosecuting Attorney at trial. The entry into the office of the petitioner to effectuate the arrest warrant for two of his employees was clearly a one time occurrence. There was no evidence presented that such an entry had previously occurred. There clearly was no showing of any existing policy on the matter within Hamilton County. The only thing that was shown was that the Prosecutor's Office was contacted for advice.

The facts further reflected that a separate governmental entity, the City of Cincinnati, sent several police officers to the scene. These police officers, when advised of the advice given by the Prosecuting Attorney, indicated that they were going to seek further opinions from their superiors. It was only when the police officers from the City of Cincinnati had arrived at the scene that the door to the petitioner's office was actually chopped down by a Cincinnati Police Officer. The Cincinnati Police Officers were clearly not under the direction or control of the County Prosecuting Attorney.

There clearly was no showing that there was any policy of Hamilton County that directed that the offices of the petitioner be searched in executing the arrest warrants for two of his employees.

As stated earlier, the Prosecuting Attorney did no more than give legal advice to the County Sheriff, as was his duty under Ohio Law. To find that the advice given to the County Sheriff, based upon the law as it existed at the time, could amount to a policy statement as required under *Monell, supra*, seems to stretch the contours and restrictions of liability as enunciated by this Court. To hold that the legal advice given by the Prosecuting Attorney becomes a county policy for which the County can be liable for an unconstitutional search under 42 U.S.C. Sec. 1983, seems tantamount to imposing liability on the County under a theory of *respondeat superior*.

The petitioner in the present action has done nothing more than show that on one particular occasion his business offices were searched without a search warrant, but pursuant to an arrest warrant issued for the arrest of two of his employees. To impose liability on the County in such a situation seems to be an end run around the prohibition that liability will not be imposed on a theory of *respondeat superior*.

CONCLUSION

The respondents firmly believe that the petitioner has failed to establish that the single incident of the constitutional deprivation which may have occurred in this case was caused by an existing, unconstitutional policy of Hamilton County attributable to the County Prosecuting Attorney.

For all of the reasons set forth above, the respondents believe that the Decision of the Court of Appeals for the Sixth Circuit should be affirmed.

Respectfully submitted,

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On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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PETITION FOR CERTIORARI FILED JANUARY 15, 1985
CERTIORARI GRANTED JUNE 17, 1985

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ARGUMENT

There is no question in this case that petitioner was denied his constitutional rights. There is no question that this deprivation occurred as a result of an order by the county prosecutor, a policymaking official. The only question is whether Dr. Pembaur has a remedy for this constitutional deprivation.

1. The county should be liable for the implementation of an unconstitutional policy decision made by an elected county official.

In the matter at hand, an elected county official, acting within the scope of his authority, made a policy decision and issued an edict or command choosing a course of action that directly caused county employees to violate petitioner's constitutional rights. For this "obvious constitutional violation" the county should be liable.

Respondents would have this Court impose government liability only where there is a formally adopted policy statement or ordinance repeatedly implemented by county employees. Formality and frequency are not the hallmarks of § 1983 liability, however. Under *Monell*, a policy statement or ordinance is not the only indicia of official policy; a decision, edict or act by a policymaking official can likewise create official policy. *Monell* v. *Department of Social Services of the City of New York*, 436 U.S. 658, 690, 694 (1980). Governmental entities are liable where a policymaking official makes a "conscious decision" choosing a course of action which becomes the "moving force" or cause of a constitutional deprivation. *City of Oklahoma City* v. *Tuttle*, ___ U.S. ___, 105 S.Ct. 2427, 2436, 85 L.Ed. 2d 791, 804 (1985). Certainly where unconstitutional conduct is expressly directed by an elected official acting within the scope of his duties, the government itself should be held accountable under 42 U.S.C. § 1983.[1]

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[1] This was the law at the time the Civil Rights Act of 1871 was adopted and has been the fundamental basis for § 1983 liability. See *Thayer* v.

The county seeks to avoid liability here by euphemistically characterizing the prosecutor's edict to "go in and get them" as legal advice.[2] The record simply does not support respondents' argument. When asked "what to do" by the deputy sheriffs (R. 365), the situation was explained and the prosecutor boldly directed them to "go in and get them." (R. 53-54, 366, J.A. 29.) The deputies then told petitioner "that if he didn't open the door and let us come in, that we had been told by the prosecutor to go in and get them." (R. 54, J.A. 29.) Such an order by the prosecutor is certainly within the scope of his powers and duties as a policymaker.

An Ohio county prosecutor is specifically authorized and required to give "instructions" to county officials "in matters connected with their official duties." Ohio Rev. Code Ann. § 309.09. Furthermore, the District Court found that a county official had given "authorization" for the forcible entry and search (P.A. 27a), and the Court of Appeals held that the prosecutor had "decided to force entry" into petitioner's

Boston, 36 Mass. 511, 516 (1837), imposing government liability for an act done "by the authority and order of the city government." See also, *City of Oklahoma City* v. *Tuttle*, *supra*, 105 S.Ct. at 2434, n.5, 85 L.Ed. 2d at 801, indicating that *Thayer* is "in harmony with the limitations on municipal liability expressed in *Monell*." See also, *Rizzo* v. *Goode*, 423 U.S. 362 (1976); *Owen* v. *City of Independence*, 445 U.S. 622 (1980).

[2] The record is quite clear that the county prosecutor's involvement in this matter was not as simple or innocuous as the respondents suggest; the prosecutor was intimately involved in this matter from its inception. The county prosecutor, pursuant to his statutory authority, initiated the investigation of petitioner, assigning the matter to an assistant, defendant Whalen. (R. 14, Ohio Rev. Code Ann. § 309.08.) The prosecutor then assigned his secret service officer to assist in the ongoing investigation (R. 15) and personally made the decision to obtain a search warrant for an April 15, 1977 search and seizure of petitioner's medical records. (R. 359.) The county prosecutor's office conducted the grand jury proceedings for which the subject capiases were issued (R. 11), and the prosecutor then gave instructions to the deputy sheriffs, pursuant to his statutory duty, as to the execution of those capiases. (R. 53-54, 366, Ohio Rev. Code Ann. § 309.09.) Finally, he prosecuted petitioner for impeding the performance by "public officials, of an authorized act within their official capacity." (Jt. Ex. IV, R. 318, 319.)

private medical office. (P.A. 8a.) Under these circumstances, petitioner has established the necessary nexus[3] between the constitutional deprivation and the county: one "whose edicts or acts may fairly be said to represent official policy" of Hamilton County personally ordered the constitutional violation. *Monell* v. *Department of Social Services of the City of New York*, *supra*, 436 U.S. at 694.

When respondents' disingenuous argument that the prosecutor merely gave "legal advice" is analyzed,[4] it becomes clear that the so-called "advice" actually articulated an existing official policy and practice. Deputy Webb testified that prior to this incident he had frequently served capiases on third party premises. (R. 56-57.) The sheriff did not disagree; he simply could not recall a specific example, but assumed that forcible entries to execute capiases on the property of third persons not named in the writs had occurred. (R. 222-223.) Thus, whether the prosecutor's order to the deputies was an edict, command or instruction which in and of itself is official policy, or was "legal advice" articulating that which was the sheriff's official policy,[5] the county must be found liable.

[3] In *City of Oklahoma City* v. *Tuttle*, *supra*, 105 S.Ct. at 2435, 85 L.Ed. 2d at 803 (1985), this Court held that the official policy requirement "was intended to prevent the imposition of municipal liability under circumstances where no wrong could be ascribed to municipal decision makers."

[4] Respondents did not make this argument below. Rather, they argued to the appellate court that "this policy or practice causing the alleged constitutional deprivation was not a policy of Hamilton County itself, but rather a policy of the Hamilton County Sheriff or the Hamilton County Prosecutor." (Brief of the Defendants-Appellees at 5.)

[5] The sheriff, also a policymaking official for the county (see Court of Appeals decison, P.A. 7a), testified that he had a policy to follow court decisions with respect to execution of capiases and warrants. (J.A. 31.) Since respondents argued (and the lower courts here held) that *United States* v. *McKinney*, 379 F.2d 259 (6th Cir. 1967), permitted the unconstitutional conduct, then that decision was adopted by the sheriff as the official policy of Hamilton County.

2. A single incident of misconduct caused by the policy decision of an elected official is sufficient to establish government liability.

Respondents argue that the implementation of a single unconstitutional decision by a policymaking official[6] is not sufficient to establish county liability under 42 U.S.C. § 1983. This Court recognized in *City of Oklahoma City* v. *Tuttle*, supra, 105 S.Ct. at 2436, 85 L.Ed2d at 804, that a single policy or decision by a policymaking official, which in and of itself is unconstitutional, need be implemented only once to establish government liability. See also concurring opinion, 105 S.Ct. at 2440-2441, 85 L.Ed.2d at 809-810. Rose Marie Tuttle failed because she could show no decision whatsoever by a policymaker; rather, she sought to infer a policy of inadequate training from a single incident of misconduct by a police officer. Dr. Pembaur, on the other hand, has been able to point to a specific command by a policymaking official choosing a course of action which proximately caused the single incident of patently unconstitutional conduct.

In *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S 247 (1981), a local government was found liable for an *ad hoc* decision to terminate a contract. While municipalities were held to be immune from punitive damages, the jury award of compensatory damages was not disturbed. See also, *Owen* v. *City of Independence*, 445 U.S. 622 (1980), involving a single unlawful termination of a municipal employee. Thus, a single incident, even if unlikely to recur, can certainly form the

[6] Respondents do not dispute that the county prosecutor is a policymaking official. However, they do suggest that not every decision by a policymaker renders a local government liable for the discretionary act. (Brief of Respondents at 10) *Bennett* v. *City of Slidell*, 728 F.2d 762 (5th Cir. 1984), cited by respondents, offers them no support. There, the court specifically found that the city attorney was not a policymaking authority. 728 F.2d at 769. The court recognized, however, that where an official is elected and thus has authority derived from his office and state law, his conduct and decisions "must necessarily" represent official policy. 728 F.2d at 766. A policymaker's "direct orders" or other acts "setting a course of action" clearly would support government liability. 728 F.2d at 767.

basis for § 1983 liability. A single decision by a policymaker, be it a city council as in *Fact Concerts*, a city manager as in *Owen*, or as in the case at hand, is sufficient to create government liability.

Respondents fail to distinguish between those cases where an official policy is sought to be inferred from a single incident of misconduct and those where a single incident of unconstitutional conduct is caused by a separately proven official policy. Thus, their reliance on *Wellington* v. *Daniels*, 717 F.2d 932 (4th Cir. 1983), is misplaced. There, plaintiff sought to impose governmental liability for a single incident of police misconduct. The court refused to infer an official policy of inadequate supervision where there was no widespread abuse and no municipal omissions from which "tacit authorization" or "deliberate indifference" could be inferred. 717 F.2d at 936. The court recognized, however, that a causal link sufficient to create governmental liability exists "where the policy commands the injury of which the plaintiff complains." 717 F.2d at 936.

Milligan v. *City of Newport News*, 743 F.2d 227 (4th Cir. 1984), and *Berry* v. *McLemore*, 670 F.2d 30 (5th Cir. 1982), also relied upon by respondents, are likewise inapposite. Again, in both of these cases the plaintiffs sought to impose government liability for misconduct by low-level employees. The courts aptly concluded that in the absence of at least tacit authorization no official policy of inadequate training or supervision would be inferred from an isolated instance of misconduct.

In the case at hand, no inference of official policy is necessary. Dr. Pembaur has introduced direct evidence[7] of

[7] Respondents characterize the county prosecutor's instruction to the deputy sheriffs to "go in and get them" as hearsay. (Brief of Respondents at 6.) Not only was no objection asserted at trial to this testimony, but Rule 801(d)(2)(D) of the Federal Rules of Evidence provides that a statement is not hearsay if made by an agent of a party-opponent concerning a matter within the scope of his agency or employment. Statements made by a public official in the course of his official duties are not hearsay and are thus ad-

both the unconstitutional official policy attributed to a county policymaker and the implementation of that policy as the cause of Dr. Pembaur's constitutional deprivation. The evidence here cannot be disputed; the county prosecutor authorized and directed the unconstitutional conduct. Thus, under *Wellington*, *Milligan* and *Berry*, the county should be liable.

Only *Losch* v. *Borough of Parkesburg*, 736 F.2d 903 (3rd Cir. 1984), (noted in Brief of Petitioner at 27 and Brief of Respondents at 10), arguably supports respondents' position. In *Losch*, however, there was a dispute as to whether the police chief was acting pursuant to some policy or was even a policymaking official. 736 F.2d at 911. Be that as it may, petitioner believes that *Losch* is wrong to the extent that it suggests or can be read to suggest that a local government may not be liable absent repeated actions by a policymaking official. As noted in petitioner's initial brief, federal courts have repeatedly and consistently held that the implementation of even a single decision by a policymaking county official can establish government liability. See, e.g. *Rookard* v. *Health and Hospitals Corp.*, 710 F.2d 41 (2d Cir. 1983); *Languirand* v. *Hayden*, 717 F.2d 220 (5th Cir. 1983), cert. denied, ____ U.S. ____, 104 S.Ct. 2656, 81 L.Ed. 2d 363 (1984); *Sanders* v. *St. Louis County*, 427 F.2d 665 (8th Cir. 1983); *McKinley* v. *City of Eloy*, 705 F.2d 1110 (9th Cir. 1983); and *Quinn* v. *Syracuse Model Neighborhood Corp.*, 613 F.2d 438 (2d Cir. 1980).

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missible. *Eastern Rotorcraft Corp.* v. *United States*, 397 F.2d 978, 983 (Ct.Cl. 1968); *United States* v. *American Telephone & Telegraph Co.*, 498 F.Supp. 353 (D.D.C. 1980); *Gannon* v. *Daley*, 561 F.Supp. 1377 (N.D. Ill. 1983). Furthermore, the statement was never offered to prove the truth of the matter asserted, but rather as evidence of the official authorization for the deputies' conduct. Again, this is not hearsay. Rule 801(c) of the Federal Rules of Evidence.

3. County liability for a constitutional deprivation caused by a decision of an elected county official is not imposed upon a theory of *respondeat superior*.

Respondents argue that even though the elected county prosecutor decided that a warrantless, non-consensual entry should be forced, the county itself should not be held accountable because this would improperly impose liability on a theory of *respondeat superior*. (Brief of Respondents at 12.) In furtherance of this *respondeat superior* argument, respondents claim that it would "stretch the contours and restrictions of liability" to find an official policy in the decision allegedly based on the prosecutor's interpretation of the law in existence at the time. (Brief of Respondents at 13.)

It is beyond cavil that the only way any government entity can act or establish policies is through the actions of individuals. See, e.g., *Van Ooteghem* v. *Gray*, 628 F.2d 488, 494-495 (5th Cir. 1980). While a unit of local government cannot be held vicariously liable under § 1983, juxtaposed against this limitation is the recognition that:

> "it is when execution of a government's policy or custom, whether made by its lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts an injury that the government as an entity is responsible under § 1983." *Monell* v. *Department of Social Services of the City of New York*, supra, 436 U.S. at 694.

Here, the Court of Appeals found, and respondents do not dispute, that the county prosecutor is one whose edicts or acts may fairly be said to represent official policy. (P.A. 7a, fn. 3.) The implementation of the prosecutor's policy decision choosing a course of action, the clear command to "go in and get them," renders the county liable under § 1983; there is no need to impose liability on a theory of *respondeat superior*.

Finally, if respondents' argument is to suggest that liability cannot be imposed for an unconstitutional policy allegedly

believed at the time to be correct, they are patently wrong. While the policymaker himself would be entitled to at least qualified immunity where the constitutional right was not clearly established, *Harlow* v. *Fitzgerald*, 457 U.S. 800 (1982), this court held in *Owen* v. *City of Independence*, 445 U.S. 622 (1980), that local governments are not entitled to such immunity. *Owen* noted that

> "even where some constitutional development could not have been foreseen by municipal officials, it is fairer to allocate any resulting financial loss to the inevitable costs of government borne by all the taxpayers, than to allow its impact to be felt solely by those whose rights, albeit newly recognized, have been violated." 445 U.S. at 655.[8]

Despite the county's protestations, the Fourth Amendment has never been interpreted to permit the egregious conduct exhibited here. Respondents argue that *United States* v. *McKinney*, 379 F.2d 259 (6th Cir. 1967), permitted the warrantless search of petitioner's private medical offices. While the county's interpretation of that case may very well be an amplification of the county's official policy at the time (the county sheriff testified that he adopted case law as his department's official policy [J.A. 31]), it did *not* authorize a search of a third person's premises to seek an individual named in a capias.

In *McKinney*, the Sixth Circuit held that an arrest warrant justifies a search of a third person's premises because there has been a judicial determination of probable cause to believe that a crime had been committed. 379 F.2d at 263. A capias or writ of attachment, however, is issued where a witness has failed to respond to a subpoena; it is punishable in contempt, neither a felony nor a misdemeanor, Ohio Rev. Code Ann. § 2317.22. A capias certainly cannot be said to create the ex-

[8] This is consistent with the common law in effect at the time the Civil Rights Act was adopted. In *Thayer* v. *Boston*, supra, 36 Mass. at 515, the court held that local governments could be liable for unlawful conduct even "if it was not known and understood to be unlawful at the time . . . ."

igent circumstances essential to override the general dictates of the Fourth Amendment. Thus, the fundamental premise supporting the search in *McKinney* is missing here. A capias simply is not the functional equivalent of an arrest warrant (or search warrant). See District Court docket entry 10, *State* v. *Pembaur*, No. C-790380 (Hamilton County Court of Appeals, February 18, 1981), reversed on other grounds, 69 Ohio St. 2d 110, 430 N.E.2d 1331 (1982).

Furthermore, *United States* v. *McKinney* did not advance a broadly accepted doctrine. Other circuit courts specifically rejected the argument that arrest warrants could constitutionally justify a search of a third person's home or office.[9] See, for example *Wallace* v. *King*, 626 F.2d 1157 (4th Cir. 1980), cert. denied 451 U.S. 969 (1981); *Virgin Islands* v. *Gereau*, 502 F.2d 914 (3rd Cir. 1974), cert. denied 424 U.S. 917 (1976); *United States* v. *Ford*, 553 F.2d 146 (D.C. Cir. 1977); and *United States* v. *Prescott*, 581 F.2d 1343 (9th Cir. 1978). This Court has also consistently held that warrantless searches are per se unreasonable except in very narrow instances. For example, in *Camara* v. *Municipal Court*, 387 U.S. 523, 528-529 (1967), it was recognized that:

> "one governing principle, justified by history and by current experience, has consistently been followed: except in certain carefully defined classes of cases, a search of private property without proper consent is unreasonable unless it has been authorized by a valid search warrant."

Finally, in *Steagald* v. *United States*, 451 U.S. 204 (1981), this Court held that even an arrest warrant is constitutionally insufficient to justify a search of premises owned by a person

[9] There is no doubt that an office is the equivalent of a home for Fourth Amendment purposes here. *State* v. *Pembaur*, 9 Ohio St.3d 136, 137 (1984), cert. denied ____ U.S. ____ 104 S.Ct. 2668, 81 L.Ed. 2d 373 (1984). See also, *Donovan* v. *Dewey*, 452 U.S. 594, 599, 101 S.Ct. 2534, 69 L.Ed. 2d 262, 269 (1981); *Coolidge* v. *New Hampshire*, 403 U.S. 443, 474 (1971); *Marshall* v. *Barlow's, Inc.*, 436 U.S. 307, 311-312 (1978); *Mancusi* v. *DeForte*, 392 U.S. 364 (1968); *See* v. *City of Seattle*, 387 U.S. 541 (1967), *Go-bart Importing Co.* v. *United States*, 282 U.S. 344 (1930).

not named in the warrant. The *Steagald* Court recognized that it has "consistently held" that warrantless entries to conduct a search, absent consent or exigent circumstances, are unreasonable under the Fourth Amendment. 451 U.S. at 211. Since an arrest warrant safeguards only the interests of the person sought to be seized, it does

> "absolutely nothing to protect the petitioner's privacy interest in being free from an unreasonable invasion and search of his home. Instead, petitioner's only protection from an illegal entry and search was the agent's personal determination of probable cause. In the absence of exigent circumstances, we have *consistently* held that judicially untested determinations are not reliable enough to justify an entry into a person's home to arrest him without a warrant, or a search of a home for objects in the absence of a search warrant . . . We see no reason to depart from this *settled course* when a search of a home is for a person rather than an object." *Steagald* v. *United States*, supra, 451 U.S. at 213-214 (citations omitted, emphasis supplied).

As the Sixth Circuit has recognized, Dr. Pembaur suffered "an obvious constitutional violation." (P.A. 6a fn. 1.) No case has ever held that a capias is constitutionally sufficient to justify a warrantless search of a third person's premises. The county should be liable here whether or not the prosecutor and sheriff misinterpreted Fourth Amendment requirements. The alleged good faith defenses of public officials is not available to the government entity. *Owen* v. *City of Independence*, 445 U.S. 622 (1980).

CONCLUSION

If the county is not liable here, then petitioner has no remedy for the deprivation of his constitutional rights. That loss was directly caused by an official policy of the county which was implemented pursuant to a direct order by an elected county official.

The judgment of the Court of Appeals with respect to the liability of the county should be reversed and the matter should be remanded for a determination of damages.

Respectfully submitted,

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Attorneys for Petitioner

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No. 84-1160

IN THE

Supreme Court of the United States

OCTOBER TERM, 1985

BERTOLD J. PEMBAUR,

Petitioner,

—v.—

CITY OF CINCINNATI, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF WASHINGTON

MOTION FOR LEAVE TO FILE AND BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES OF OHIO AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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NO. 84-1160

IN THE
SUPREME COURT OF THE UNITED STATES

Bertold J. Pembaur,
Petitioner,

v.

City of Cincinnati, et al.,
Respondents,

On Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

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MOTION FOR LEAVE TO FILE BRIEF OF THE AMERICAN CIVIL LIBERTIES UNION AND THE AMERICAN CIVIL LIBERTIES UNION OF OHIO, AMICI CURIAE

The American Civil Liberties Union ("ACLU") and the ACLU of Ohio respectfully move for leave to file the within brief amici curiae. The petitioner has consented to the filing of this brief; the respondents have not.

The American Civil Liberties Union is a nationwide, nonpartisan organization of more

than 250,000 persons dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law. The ACLU of Ohio is one of its state affiliates.

The American Civil Liberties Union and its affiliates have long worked to defend basic constitutional rights and in so doing, have in recent years filed briefs, as counsel for a party or as amicus curiae, in many cases that required construction of 42 U.S.C. §1983, the statute at issue in this case. Accordingly, we move to file this brief amici curiae to bring that experience to bear on the important questions presented by this case.

Respectfully submitted,

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August 1, 1985

QUESTION PRESENTED

Whether the single, discrete decision of an elected County Prosecutor and elected County Sheriff authorizing subordinate police officials to force entry into petitioner's office constitutes the County's "official policy" for purposes of liability under the 42 U.S.C.§ 1983.

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STATEMENT OF THE CASE

The petitioner is a physician. In connection with a Grand Jury investigation of him, subpoenas were issued for the appearance of two of petitioner's employees. When they failed to appear as directed, a writ of attachment -- known in Ohio practice as a "capias" -- was issued for the arrest of each employee.

Although the capiases listed the employees' home addresses, two deputy sheriffs of Hamilton County, Ohio sought to execute service at the petitioner's office. The petitioner refused them permission to enter.

The deputy sheriffs then called their superiors for instructions. Ultimately, after consultations up the chain of command, the County Prosecutor and the County Sheriff authorized the deputy sheriffs to serve the

capias, even if forced entry into petitioner's office was necessary.[1]

The deputy sheriffs first attempted to batter down the door to petitioner's office and, when that failed, participated in chopping down the door with an axe.[2] The deputy sheriffs then entered the petitioner's office but the employees were not found.

The Petitioner brought suit against the County[3] alleging a violation of his constitutional rights. After a bench trial, the District Court dismissed the case in its entirety concluding, without significant analysis, that "Pembaur suffered no constitutional deprivation as a result of county policy or custom." 746 F2d at 340.[4]

The Court of Appeals affirmed the district court decision as to the County.[5] It concluded that the "single,

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[1] Upon being advised that petitioner would not voluntarily permit the deputies to search his office for the two witnesses, the Prosecutor Simon Leis ordered the deputies to "go in and get them." (R. 53-54, J.A. 23-25.)

[2] At the time of the forced entry into petitioner's office, the deputy sheriffs were accompanied and assisted by police officers of the City of Cincinatti. The Court of Appeals held that those City police officers were acting pursuant to longstanding City policy authorizing the use of force, including forced entry, to serve a capias. 746 F.2d 337, 341 (6th Cir. 1984). The city did not seek review of that decision in this Court. Therefore the petitioner's claims against the City are not at issue here.

[3] Footnote on next page.

[3] The petitioner also named other governmental entities and individual officials as defendants. See the description of the case in the decision below, 746 F.2d at 339. Those claims are not relevant to the Monell liability of the County at issue here.

[4] The District Court also held that the County was not responsible for the Sheriff's acts because the Sheriff was not subject to the control of the County Board of Commissioners. The Court of Appeals reversed that aspect of the district court decision, 746 F.2d at 341, and no further review of that issue has been sought.

[5] However, the court reversed as to the petitioner's claim against the City because of testimony by the Chief of Police "that the policy and past practice of his department was to use whatever force was necessary including forcible entry to serve a capias." 746 F.2d at 337.

discrete decision [to force entry into petitioner's office] is insufficient, by itself, to establish that the Prosecutor, the Sheriff, or both were implementing a governmental policy." Id. at 341.

The issue before this Court is whether the order of the County Prosecutor and Sheriff, directing the forcible entry into petitioner's office, constituted the County's "official policy" for purposes of Monell liability.

SUMMARY OF ARGUMENT

It is now well established that a municipality may be liable under 42 U.S.C. §1983. Monell v. Department of Social Services, 436 U.S. 658 (1978). However, the municipality is not subject to suit merely on a theory of respondeat superior, but rather

only when the unconstitutional act in question was caused by the government's own policy or custom. This case raises the question of whether a single act, implementing an order by County policymaking officials, is sufficient to constitute the County's "official policy" for purposes of Monell liability. Amici contend that it is.

A "policy" is not determined by the number of times it is implemented, but rather by the authority of its source. In this case, the County Prosecutor and the County Sheriff ordered police officials forcibly to enter the petitioner's office in order to serve writs of attachment, not on the petitioner himself but on two of his employees. That order, and the forcible entry it caused, was clearly unconstitutional. And the County is properly held responsible for the consequences of that order because it was given by policymaking

officials, acting within the scope of their policymaking authority and represents the governmental choice of the very authorities empowered by state law to make it.

The fact that the petitioner's case may have been the first time that policy was implemented, is entirely irrelevant. If a policy existed, then the municipality is subject to Monell liability any time -- even the first time -- that policy is the cause of a constitutional violation.

To hold otherwise would permit the municipality a "free" constitutional violation, surely an unacceptable result. Moreover, narrowing municipal liability so as to preclude recovery for the first offense, would seriously undermine the important purposes of §1983 liability: compensating the victim and deterring constitutional wrongdoing.

ARGUMENT

THE SINGLE DISCRETE DECISION BY AN ELECTED COUNTY PROSECUTOR AND AN ELECTED COUNTY SHERIFF AUTHORIZING SUBORDINATE POLICE OFFICIALS TO FORCE ENTRY INTO PETITIONER'S OFFICE CONSTITUTES THE COUNTY'S "OFFICIAL POLICY" FOR PURPOSES OF LIABILITY UNDER 42 U.S.C. §1983.

In Monell v. Department of Social Services, 436 U.S. 658 (1978), this Court held that a municipality can be liable under 42 U.S.C. §1983 for a constitutional injury caused by a "government policy or custom." Id. at 694. Because Monell "unquestionably involve[d] official policy as to the moving force of the constitutional violation," id. at 695, the Court "left for another day" the task of defining the necessary ingredients of a policy or custom under §1983. This case presents the question reserved in Monell in a context never before squarely addressed.

Here, the act in question -- axing down a doctor's office door so as to effect service of process on his employees, who were

not even known to be there -- was concededly unconstitutional.[6] Furthermore, there is no dispute that the unconstitutional entry was done on the authority of the highest law enforcement officials of the County: the County Prosecutor and the County Sheriff. Thus, their orders can be fairly said to have caused the forced entry -- they were "the moving force of the constitutional violation." Polk County v. Dodson, 454 U.S. 312, 326 (1981).

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[6] Relying on Steagald v. United States, 451 U.S. 204 (1981) the Court of Appeals below held that

> "... it is clear that autorities may not legally search for the subject of an arrest warrant in the home or office of a third party without first obtaining a search warrant." 746 F.2d, at 340, n.1.

The respondent has not sought review of that holding, and must be deemed bound by it, at least for purposes of determining Monell liability.

The only remaining question, therefore, is whether that order of the County Prosecutor and Sheriff -- directing the deputy sheriffs to break down the door of petitioner's office -- constituted the "official policy" of the County. Amici urge the Court to conclude that it did, notwithstanding that it may have been the first time that policy was given effect.

A. The Determination Of "Official Policy" Looks To The Authority Of Its Source, Not The Frequency Of Its Application.

1. The Power to Establish Official Policy

This Court has recognized that an official government policy may take many forms. Monell, supra at 694-95. Obviously, official policy may be a formal rule of a municipality's executive authorties, as in Monell itself. It may also be a promulgation of a municipal legislative body. See Owen v.

City of Independence, 445 U.S. 622 (1980); Newport v. Fact Concerts, Inc., 453 U.S.247 (1981). However, Monell also recognized that, for purposes of §1983 liability, a "policy" need not be a formal, written act of the municipality: policy may be "made by [a municipality's] lawmakers or by those whose edicts or acts may fairly be said to represent official policy." 436 U.S. at 694.

In each case the critical question is whether the action in question was "taken by the city, as opposed to an action taken unilaterally by a nonpolicymaking municipal employee." Oklahoma City v Tuttle, 53 U.S.L.W. 4639, 4645 (June 3, 1985) (Brennan, J., concurring). Where the act is by a nonpolicymaking employee, and where it is unilateral -- that is, not compelled by higher municipal authority -- then the government cannot be said to have acted, for purposes of Monell liability. Such was the

rationale for the Court's decision in Tuttle. Conversely, however, when a policymaking official, functioning within the scope of that official's policymaking authority, orders that an act be done, it necessarily becomes the offical policy of the government.

In this case, the unconstitutional act was ordered by the County Prosecutor and the County Sheriff. Each is an elected official of the County. Ohio Rev. Code Ann. §§ 309.01 (Prosecutor) and 311.01 (Sheriff). The Sheriff is the "chief law enforcement officer of the county," 1962 Op. Attorney General No. 3109, and the Prosecutor is the "legal advisor" for all county officers, Ohio Rev. Code Ann. § 309.09, which includes deputy sheriffs. The Prosecutor also has statutory responsibility for inquiry into crimes and

prosecuting complaints. Id. at § 309.08.[7]

Not surprisingly, the court of appeals recognized that both the Prosecutor and the Sheriff were officials of such authority and rank in the County government to establish "offical policy in a proper case." 746 F2d, at 341, and n.3. The only reason the court concluded that official policy was not established in this case was that the order to forcibly enter the petitioner's office was "a single, discrete decision." Id.

2. Frequency of Application Is Not Determinative of Official Policy

In determining whether an official's action is government policy, the number of times that official has repeated the act is clearly irrelevent. Of course, a history of prior action, or inaction, may be evidence of

[7] Further descriptions of the policymaking powers of these Couty officials appears in the decision below, 746 F.2d at 340.

the existence of a policy, if that is in dispute; just as such a history evidences a government "custom," for purposes of Monell liability. But whereas a custom, by definition, depends on that history, a policy becomes effective when ordered, and applies the first time it is implemented as well as every time thereafter until it is changed. Thus, the difference between a "policy" and a "custom" is that the former is determined by the authority of the promulgation rather than the frequency of its application, whereas a custom achieves authority by the pattern of its application (or inapplication). See e.g., Monell, supra at 690-91.

Indeed, both the plurality and concurring opinions in Tuttle recognized that even a single, discrete act implementing an official policy may be sufficient to

establish Monell liability.[8]

> "Obviously, it requires only one application of a policy... to satisfy fully Monell's requirement that a municipal corporation be held liable only for constitutional violations resulting from the municipality's official policy.
>
> "...To establish the constitutional violation in Monell no evidence was needed other than a statement of the policy by the municipal corporation, and its exercise." 53 U.S.L.W. at 4643 (Rehnquist, J.).

See also, Id. at 4645 (Brennen J., concurring). The Court of Appeals decision to the contrary is wrong as a matter of law, and does not make good sense.

Even though this case may have arisen in connection with the first implementation of

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[8] Furthermore, although not specifically addressing the issue, two decisions of this Court have involved claims arising from the first-time implementation of policy by a municipality's ploicymakers. See Owen v. City of Independence, supra and Newport v. Fact Concerts, supra. In both cases, Monell liability was imposed (though in Fact Concerts punitive damages were not allowed).

the County Prosecutor's and Sheriff's order forcibly to enter third party premises to serve a capias, that order has all of the trappings of "official policy." In addition to the authority of the two officials who issued the order, see supra, this Court has recognized that the word 'policy' generally implies "a course of action consciously chosen from among various alternatives." Oklahoma City v. Tuttle, supra at 4643. That was certainly so here, where the authorities had many alternatives[9] and quite deliberately chose the most constitutionally problematic. They had a choice, they made it and that choice was the policy they established.

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[9] Since there was no suggestion of exigency, the Prosecutor could have, for example, sought a search warrant, or the deputies could have been ordered just to wait, or they could have investigated whether the witnesses were elsewhere.

Secondly, for purposes of Monell liability, a plaintiff's strongest case exists when there is "some affirmative link between the policy and the particular constitutional violation alleged." Tuttle, supra at 4643. And in this case, that link was as direct as in Monell, supra, Owen, supra, and every other case in which municipal liability has been sustained. Here, the Prosecutor's order to "go in and get them" was a statement of the policy, and it was the immediate (indeed, it was the only), cause of the constitutional violation physically perpetrated by the deputy sheriffs.

Unlike Tuttle, this is not a case where a single wrongful act of a low-level employee is cited merely to infer the existence of a government policy. In this case, the single wrongful act of the line police officers was authorized by senior-level officials who

established policy by their order forcibly to enter the petitioner's premises.

Furthermore, any different conclusion would lead to absurd results. For one thing, the government would then be entitled to one "free" constitutional violation, which certainly cannot be the law.

> "A rule that the city should be entitled to its first constitutional violation without incurring liability ... would be a legal anamoly, unsupported by the legislative history or policies underlying §1983." Tuttle, supra at 4645 (Brennan J., concurring).

It should also be noted that any such rule would, in effect, create a form of governmental immunity, at least for the first offense, such as was specifically rejected in Owen, supra.

The lower court decision also muddles the distinction between policy and custom. If the Prosecutor and Sheriff had ordered the break-in of petitioner's premises and then, not finding the witnesses there, had further

ordered two or three other break-ins that day, presumably the Sixth Circuit would have found the requisite policy. However the policy -- authorizing forcible entry to serve a capias -- would have been precisely the same at the time of the third forced entry as it was when the Prosecutor first ordered "go in and get them." What changed was that the third victim might be able to establish "custom" liability based just on the acts of the police officers, without even relying on the explicit policy choice of the Prosecutor.

Finally, the "single incident" rule adopted by the Court of Appeals undermines the dual purposes of §1983 liability against municipalities: compensation and deterrence.

B. The Compensatory and Deterrent Functions of §1983 Require Municipal Liability Under the Circumstances of this Case.

By enacting Section One of the Civil Rights Act of 1871, now codified as 42 U.S.C. §1983, Congress made those persons (now

recognized to include municipalities) who, under color of state law, violate a person's constitutional rights, liable for injuries resulting from the violation. History and precedent establish that the primary goals of §1983 are the compensation of the victims of unconstitutional action, and deterrence of like misconduct in the future. See Owen v. City of Independence, supra, Robertson v. Wegmann, 436 U.S. 584, 591 (1978); Carey v. Piphus, 435 U.S. 247, 256-57 (1978). Any rule that would shield a municipality from §1983 liability for its unconstitutional actions, regardless of the municipality's causal responsibility for the injury incurred, would subvert the compensatory and

deterrent purposes of §1983.[10]

As the Court has emphasized in recent decisions, municipal liability plays a critical role in fulfilling the compensatory purpose of the statute. In Monell, 436 U.S. at 685 & n.45, the Court noted that statements by supporters of §1983 indicated Congress' intention to redress the unconstitutional misconduct of even municipalities by making those municipalities liable for compensatory damages. Later, in

[10] See J.O. Newman, Suing the Lawbreakers: Proposals to Strengthen the Section 1983 Damages Remedy for Law Enforcers' Misconduct, 87 Yale L.J. 447, 456 (1978) (goals of compensation and deterrence more frequently met if defendant is the government, not an individual); cf. Robertson v. Wegmann, 436 U.S. at 599 (Blackmun, J., dissenting) (objecting to a state survivorship law that abated a § 1983 claim where there was obvious unconstitutional misconduct because "[a]ny crabbed rule of survivorship obviously interferes directly with the second critical interest [deterrence] and may well interfere with the first [compensation]").

holding that a municipality does not enjoy qualified immunity under §1983 based on the good-faith actions of its officers, the Court emphasized that compensatory damages "[are] a vital component of any scheme for vindicating cherished constitutional guarantees." Owen v. City of Independence, supra at 651; see Carey v. Piphus, supra at 254-56 (§1983 damages should compensate persons for injuries caused by deprivation of constitutional rights); cf. Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388, 397 (1971) (in action for damages directly under Fourth Amendment, plaintiff is entitled to compensation); Butz v. Economou, 438 U.S. 478, 506 (1978) (in Bivens action, damages can be important means of vindicating constitutional guarantees). In both Monell and Owen, the compensatory purpose of §1983 served as a rationale for refusing to shield

municipalities from §1983 liability.

The importance of compensation for constitutional wrongs "is only accentuated when the wrongdoer is the institution that has been established to protect the very rights it has transgressed." Owen v. City of Independence, supra at 651. Local police should protect citizens against violent, lawless behavior, not subject them to it. When a municipality's official policy choice causes a deprivation of liberty or life without due process, albeit in a single incident, the victim of the municipality's unconstitutional misconduct should receive compensation.[11]

The ruling below effectively deprives plaintiffs of compensation, since the

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[11] In addition, a municipality is far less likely to be judgment-proof than is a city police officer.

individual officers have already been granted the benefit of a good faith immunity merely for following orders. And this Catch 22 dilemma is likely to recur in virtually every instance.[12]

Deterrence serves as the second essential purpose behind §1983. Owen v. City of Independence, supra; Newport v. Fact Concerts, Inc., supra at 268; Robertson v. Wegmann, supra at 590-91 (1978); Carey v. Piphus, supra, U.S. at 256-57; Imbler v.

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[12] Of course, the immunity of those officials does not preclude a claim against the responsible municipality. Owen, supra.

Pachtman, 424 U.S. 409, 442 (1976) (White, J., concurring in the judgment).[13] In explaining the deterrent rationale for holding that municipalities do not have qualified immunity under §1983, the Court in Owen stated:

> The knowledge that a municipality will be liable for all of its injurious conduct, whether committed in good faith or not, should create an incentive for officials who may harbor doubts about the lawfulness of their intended actions to err on the side of protecting citizens' constitutional rights.

Owen v. City of Independence, supra at 651-52 (footnotes and citation omitted). Cf. United States v. Johnson, 457 U.S. 537, 561 (1982) (retroactive application of decision upholding Fourth Amendment claim gives government incentive to err on side of constitutional behavior).

Furthermore, the deterrent role of a §1983 damages remedy in cases such as this has no current substitute. Los Angeles v. Lyons, 461 U.S. 95 (1983), effectively reduces the availability of injunctive relief under §1983 against unconstitutional police practices. Federal criminal prosecutions for violations of federal civil rights[14] are only sporadically used, cannot be privately enforced, and require a heavier burden of proof than that required in a civil action. And a municipality is free from the spectre of punitive damages for its constitutional

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[13] See also Carlson v. Green, 446 U.S. 14, 21 & n. 6 (1980) (Bivens remedy has deterrent as well as compensatory purpose, and § 1983 serves similar purposes). The legislative history of § 1983 contains numerous references to the intended deterrent effect of the statute. See Schnapper, Civil Rights Litigation After Monell, 79 Colum. L. Rev. 213, 244-45 & n. 174 (1979) (quoting seven Congressmen).

[14] E.g., 18 U.S.C. §§ 241, 242, & 245.

violations. Newport v. Fact Concerts, Inc., supra.

Individual defendants, insulated from damages by either an absolute[15] or a qualified immunity[16] are unlikely to be deterred by the spectre of a §1983 suit. To deny municipal liability as well for official decisions made by the highest authorities in the chain of command will entirely eliminate the incentive to minimize unconstitutional behavior. Cf. Marbury v. Madison, 1 Cranch 137, 163 (1803) ("The very essence of civil liberty certain consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. One of the first duties

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[15] E.g., Imbler v. Pachtman, 424 U.S. 409 (1976) (prosecutors); Pierson v. Ray, 386 U.S. 547 (1967) (judges).

[16] E.g., Harlow v. Fitzgerald, 457 U.S. 800 (1982) (broadening "good-faith" immunity by allowing defendants to satisfy only an objective standard).

of government is to afford that protection.").

Lastly the §1983 damages remedy is based in part a theory of deterrence that, presupposes rational decisionmakers will take only those actions where benefits exceed costs. Thus, a damages remedy performs a deterrent function by forcing a party to consider the costs of certain action or inaction that would otherwise have been borne by some other party.

> Consideration of the municipality's liability for constitutional violations is quite properly the concern of its elected or appointed officials. Indeed, a decisionmaker would be derelict in his duties if at some point he did not consider whether his decision comports with constitutional mandates and did not weigh the risk that a violation might result in an award of damages from the public treasury. Owen, supra at 656 (emphasis in original).

Under this view of deterrence, liability should be placed on the party best able to determine the true costs and benefits of a

given course of action and to effect a change in behavior based on that determination.[17] A damages remedy thus provides general deterrence against constitutional violations while respecting the values of federalism that favor the decisionmaking independence of local officials. Cf. Rizzo v. Goode, 423 U.S. 362 (1976).

[17] See Calabresi & Hirschoff, Toward a Test for Strict Liability in Tort, 81 Yale L.J. 1055, 1060 (1972).

CONCLUSION

For the foregoing reasons, the judgment of the United States Court of Appeals for the Sixth Circuit should be reversed.

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